Petition

Supreme Court, U.S.
FILED
MAR 19 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1748

In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA, PETITIONER

v.

HELEN MITCHELL, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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QUESTION PRESENTED

Whether the United States is accountable in money damages for alleged breaches of trust in connection with its management of forest resources situated on allotted lands of the Quinault Indian Reservation.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Claims in this case.

OPINION BELOW

The opinion of the Court of Claims (App. A, *infra*, 1a-42a) is reported at 664 F.2d at 265.

JURISDICTION

The decision of the Court of Claims was filed on October 21, 1981. On January 14, 1982, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including March 20, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

STATUTES INVOLVED

Because of their number and considerable length, the relevant statutes, Sections 7 and 8 of the Act of June 25, 1910, ch. 431, 36 Stat. 857, as amended by Pub. L. No. 88-301, 78 Stat. 186-187, 25 U.S.C. 407 and 406; Section 6 of the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 986, 25 U.S.C. 466; the Act of May 26, 1928, ch. 756, 45 Stat. 750, 25 U.S.C. 318a; Sections 1-3 of the Act of February 5, 1948, ch. 45, 62 Stat. 17-18, 25 U.S.C. 323-325; and Section 1 of the Act of June 24, 1938, ch. 648, 52 Stat. 1037, 25 U.S.C. 162a, are reproduced in Appendix B, *infra*, 43a-50a.

STATEMENT

1. In four actions consolidated before the Court of Claims, respondents seek to recover damages from the United States for the alleged mismanagement of timber resources on lands allotted to individual Indians from the Quinault Reservation in the State of Washington. The respondents are 1,465 individuals owning interests in such allotments, the Quinault Tribe, which now holds portions of the allotted lands, and an unincorporated association of Quinault Reservation allottees.

The Quinault Reservation was established in 1873 by an Executive Order, I C. Kappler, *Indian Affairs* 923 (2d ed. 1904), that implemented the Treaty between the United States and the Qui-nai-elt and the Quil-leh-ute Indians, July 1, 1855 ("Treaty of Olympia"), 12 Stat. 971. Between 1905 and 1935 the entire reservation was allotted to individual Indians under the General Allotment Act of 1887, ch. 119, 24 Stat. 388, 25 U.S.C. 331 *et seq.* Section 5 of that Act, 25 U.S.C. 348, provided that the United States would "hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment

shall have been made * * *." The period during which the United States was to hold the land thus allotted was subsequently extended indefinitely by the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984, 25 U.S.C. 462.

Much of the land within the Quinault Reservation is heavily forested.[1] The forest resources on the allotted lands have been managed by the Department of the Interior, which has sold the timber from individual allotments and administered the revenues from the sales. The Secretary of the Interior was authorized by Section 8 of the Act of June 25, 1910, ch. 431, 36 Stat. 857, 25 U.S.C. 406, to approve the sale by the allottee of timber on any Indian land "held under a trust or other patent containing restrictions on alienations * * *."[2] Since 1934, the

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[1] In the early years of this century, the government concluded that the forested areas of the Quinault Reservation were not to be allotted pursuant to the General Allotment Act because they were not suited for the "agricultural or grazing purposes" contemplated by Congress. See 25 U.S.C. 331. This Court rejected the government's position in *United States* v. *Payne*, 264 U.S. 446 (1924), observing that forested lands could be cleared for cultivation, and concluding that the General Allotment Act did not preclude "an allotment of timbered lands, capable of being cleared and cultivated * * *." 264 U.S. at 449. Following the decision in *Payne* the forested lands of the Quinault Reservation were allotted, a process that was completed by 1935.

[2] Prior to the enactment of a 1964 amendment, Pub. L. No. 88-301, 78 Stat. 187, Section 406 (25 U.S.C. (1958 ed.)) provided:

> The timber on any Indian allotment held under a trust or other patent containing restrictions on alienations may be sold by the allottee, with the consent of the Secretary of the Interior, and the proceeds thereof shall be paid to the allottee or disposed of for his benefit under regulations to be prescribed by the Secretary of the Interior.

Secretary has been directed to adhere to the principles of sustained-yield forestry on all Indian forest lands under his supervision. 25 U.S.C. 466. And since 1964, 25 U.S.C. 406 has required the Secretary to consider, *inter alia*, the state of growth of the timber and the present and future financial needs of the allottee and his heirs in making his decisions respecting timber sales.[3] Finally, the Secretary is authorized to deduct an administrative fee for his services from the timber revenues paid out to the Indian allottees. 25 U.S.C 406(a), 413. Under this statutory authority the Secretary of the Interior has developed a detailed set of regulations, 25 C.F.R. Part 141, governing sale and harvesting of Indian timber, and has the power to exercise day to day supervision over the harvesting and management of timber. See generally, *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 145-147 (1380).

In their claims, filed commencing in 1971, respondents have alleged that the Secretary has engaged in several improper practices in connection with his management of timber lands allotted from the Quinault Reservation. Specifically, they assert that he has (App. A, *infra*, 2a-3a):

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[3] As amended, Section 406 provides in pertinent part:

> Sales of timber under this subsection shall be based upon a consideration of the needs and best interests of the Indian owner and his heirs. The Secretary shall take into consideration, among other things, (1) the state of growth of the timber and the need for maintaining the productive capacity of the land for the benefit of the owner and his heirs, (2) the highest and best use of the land, including the advisability and practicability of devoting it to other uses for the benefit of the owner and his heirs and (3) the present and future financial needs of the owner and his heirs.

(1) failed to obtain fair market value for timber sold;

(2) failed to manage timber on a sustained yield basis;

(3) failed to obtain payment for some merchantable timber;

(4) failed to develop a proper system of roads and easements, and exacted improper charges from allottees for roads;

(5) failed to pay interest on certain funds;

(6) paid insufficient interest on certain funds; and

(7) exacted excessive administrative fees from allottees.

Respondents contend that they are entitled to recover money damages for the alleged misdeeds because the Secretary's actions have breached a fiduciary duty owed them by the United States as trustee under various statutes.

2. In *United States* v. *Mitchell*, 445 U.S. 535 (1980), this Court reversed an earlier decision of the Court of Claims in this case, *Mitchell* v. *United States*, 591 F.2d 1300 (1979) (*Mitchell I*), and remanded the case to that court for further proceedings that culminated in the decision that we now tender for review.

a. In 1977 the United States had moved to dismiss respondents' actions on the ground that the United States had not consented to maintenance of these suits or otherwise waived its sovereign immunity in respect of such claims. In response, in *Mitchell I*, a unanimous en banc Court of Claims held that Section 5 of the General Allotment Act, 25 U.S.C. 348,

which recites that allotments are to be held in trust by the United States for the benefit of the Indian allottee, creates an express trust relationship (591 F.2d at 1302), and that the availability of a damages remedy against the United States was "the necessary inference from the statute" (*ibid.*), because, in the court's view, injunctive or other prospective relief would be an inadequate remedy for the injuries alleged here (*id.* at 1302-1303).

Because the Court of Claims concluded that the General Allotment Act itself provided the necessary authority for recovery of damages for the United States' alleged failure properly to manage the forest resources of the Quinault Allotments (591 F.2d at 1302 n.11), the court did not address the sufficiency of alternative statutory bases for recovery of damages advanced by respondents. These included the timber management statutes (see pages 3-4, *supra*) 25 U.S.C. 406, 407, 413 and 466, as well as 25 U.S.C. 349 and 372, which govern issuance of fee patents to allottees, 25 U.S.C. 318a, 323-325, which regulate grants of rights of way across Indian lands, and 25 U.S.C. 162a, which addresses investment of tribal and individual Indian funds (591 F.2d at 1304-1305 & n.18). Instead, the Court of Claims merely stated that "these additional statutes furnish statutory directives—substantive rules of conduct" that should be taken into account as "congressional gauges of proper trustee conduct" in "deciding whether the Government violated its obligations as trustee under the General Allotment Act" (*id.* at 1305). Finally, the Court of Claims noted that "there is undoubted jurisdiction in this court, aside from any trust relationship under those statutes, over the claims in which plaintiffs seek to recover their own monies retained or deducted by the Government—unreason-

able fees and service charges deducted for work performed by the [United States]; improper deduction of road maintenance costs; and any other claims that the Government illegally kept some of the Indians' own money and property" (*id.* at 1305 n.19; citation omitted).

b. As indicated above, however, this Court reversed the judgment of the Court of Claims. *United States* v. *Mitchell*, *supra*, 445 U.S. 535. Based upon the language and legislative history of Section 5 of the General Allotment Act, which recites the trust tenure of the allotted lands, and events surrounding and following the passage of that Act (445 U.S. 542-546), the Court concluded that the Act "created only a limited trust relationship between the United States and the allottees that does not impose any duty upon the Government to manage timber resources" (445 U.S. 542). The "trust" language of Section 5, the Court stated, was not intended to impose fiduciary management duties, or to render the United States answerable in damages for breach thereof, but only to prevent improvident alienation of the allotted lands and assure their immunity from state taxation (*id.* at 544). The Court accordingly declined to "consider whether, had Congress actually intended the General Allotment Act to impose upon the Government all fiduciary duties ordinarily placed by equity upon a trustee, the Act would constitute a waiver of sovereign immunity" (*id.* at 542).

Because the Court of Claims had not passed upon them, the Court declined to consider, in the first instance, alternative bases advanced by respondents in support of their action for damages, including the statutes that govern the Secretary's management of Indian forest lands and other properties (see page 6, *supra*), the "special relationship" between the United States and Indian tribes, and an implied con-

tract argument (445 U.S. at 546 n.7). Rather, concluding that "[a]ny right of respondents to recover money damages for Government mismanagement of timber resources must be found in some source other than [the General Allotment] Act" (*id.* at 546), the Court remanded for further proceedings in the Court of Claims.[4]

3. On remand, the Court of Claims, again sitting en banc, again held the United States subject to suit for money damages on most of the claims advanced by respondents (App. A, *infra*, 1a-23a). Judge Nichols dissented in part (*id.* at 23a-42a).

The Court of Claims acknowledged that claims for money damages not resting on a contract or seeking recovery of money wrongfully held by the government, must rest upon a statute, regulation, or constitutional provision that may fairly be " 'interpreted as mandating compensation by the Federal Government for the damage sustained' " (App. A, *infra*, 3a-4a, quoting *United States* v. *Testan*, 424 U.S. 392, 400 (1976)), and that a substantive right enforceable by declaratory or injunctive relief is insufficient to authorize recovery of damages (App. A, *infra*, 4a). The court refused, however, to confine implication of a right to recover money damages to actions resting upon statutes that direct payment of money (*id.* at 5a-6a).

Turning to the statutes upon which respondents relied, the court held that the timber management

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[4] Justice White, joined by Justices Brennan and Stevens, dissented from the Court's disposition, concluding that the General Allotment Act created a true trust encompassing forestry management duties (445 U.S. at 547-549) and that liability in damages follows from "the existence of a trust and fiduciary duties" (*id.* at 550). The Chief Justice did not participate in the decision.

statutes (25 U.S.C. 406, 407 and 466) and the statutes governing rights of way (25 U.S.C. 318a, 323-325) created a fiduciary duty respecting management of forested allotted lands, and gave rise to monetary liability for breach of that duty (App. A, *infra*, 6a-17a). The court noted first the comprehensive character of federal oversight of Indian forestry activities (*id.* at 7a-8a). Next, the court concluded that although no express trust was established by these statutes a "long-continuing doctrine of governmental fiduciary obligation in the management of Indian property was * * * infused into" the governing statutes (*id.* at 9a),[5] and that those statutes "have broadened the special trust imposed by the Allotment Act to create a general fiduciary obligation on the Government in the operation and management of the forest lands with which Interior was entrusted" (*ibid.*).

Having determined that the United States bore the obligations of a general trustee, the court examined the particular statutes at issue, concluding that they embody congressional consent to maintenance of an action for damages for breach of fiduciary duty (App. A, *infra*, 9a-16a). The timber management statutes, the court concluded, reflected a congressional intent to maximize Indian revenues for the

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[5] The court explained (App. A, *infra*, 8a; citing *Navajo Tribe of Indians* v. *United States*, 624 F.2d 981, 987 (Ct. Cl. 1980)):

> We have held that "where the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection."

long term. The court stated that there is no room to question that an action could be maintained to compel the United States to disgorge the actual proceeds of timber sales. Relying principally upon the law of private trusts and the perceived inadequacy of prospective equitable remedies, however, the court refused to "confine the Indians to the actual proceeds of actual sales" (*id.* at 12a), extending the monetary remedy to recovery of any additional sums that would have been earned by a properly vigilant fiduciary.[6]

A limit was placed, however, on the kinds of injuries for which damages might be recovered. Respondents might secure damages for (App. A, *infra*, 10a-11a):

> (a) any fall-off from the income they would have received from their forests and lands if the Government had properly complied with the directives of the statutes and regulations, and (b) the value (or decrease in value) of their

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[6] Similar reasoning was employed to infer from the various road construction and right of way statutes the right to recover damages for failure to secure proper compensation for rights of way granted over Indian lands and failure to properly maintain rights of way, for levying of road building fees upon the respondents, and for loss of income or property value caused by the Secretary's failure to construct a road network appropriate for proper forest care (App. A, *infra*, 15a-16a).

By contrast, the court found no right to recovery for alleged improvident issuance of fee patents to individual allottees under 25 U.S.C. 349 and 377. The court concluded that those statutes are "almost purely regulatory" and "suggest[] little of the assumption of fiduciary responsibility," adding that the General Allotment Act itself, as construed in this Court's *Mitchell I* decision, did not include a true fiduciary or guardianship relationship toward the Indian owners (App. A, *infra*, 21a & n.18).

> property which is lost (or diminished in value) through improper actions of Interior.[7]

Damages for consequential or indirect injury, whether economic, social, or psychological in character were disallowed (App. A, *infra*, 11a, 16a-18a), however. The court reasoned that these were not within the contemplation of Congress (*id.* at 18a).

In addition to imposing liability for any proven mismanagement of timber resources and rights of way, the Court of Claims held that under 25 U.S.C. 162a, the respondents were entitled to damages for interest not paid, or paid at a rate reflecting less than "reasonable management zeal to get * * * the best [interest] rate" available for respondents' funds held by the Secretary of the Interior (App. A, *infra*, 19a-20a).[8]

In closing, the court treated several other bases for recovery advanced by the respondents. The court reaffirmed (see pages 6-7, *supra*) that damages could be awarded in respect of claims resting upon unlawful or excessive charges for administrative fees that had been deducted from revenues owing to respondents (App. A, *infra*, 19a).[9] And the court noted the

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[7] Disavowing any view as to the merits, the court stated that the standard to be applied in determining liability was whether the conduct of government agents was "in good faith and within the realm of their acceptable discretion" or, by contrast, was "arbitrary, capricious, in abuse of discretion or contrary to law" (App. A, *infra*, 18a & n.15).

[8] No interest was allowed, however, on the other items of damages approved by the Court of Claims, because no statutory authority exists for pre-judgment interest against the United States in these circumstances (App. A, *infra*, 20a).

[9] The court rejected the government's contention that individual respondents had failed to exhaust administrative remedies through which they might seek an adjustment of these charges (App. A, *infra*, 22a-23a).

United States' agreement that damages could be awarded for any taking without just compensation that respondents might establish (*id.* at 21a). Finally, the court rejected (*id.* at 22a) respondents' characterization of their claims as grounded upon contracts expressed or implied-in-fact, upon which recovery was available even in the absence of a statutory basis outside the Tucker Act.[10]

Judge Nichols dissented in significant part (App. A, *infra*, 32a-42a), concluding that the United States had not consented to be sued for mismanagement of forest resources and rights-of-way. He joined in the majority's disposition of the remaining claims and theories of recovery.

REASONS FOR GRANTING THE PETITION

The Court of Claims' *Mitchell II* decision represents a significant departure from the teaching of this Court respecting the clear statutory predicate necessary to hold the United States answerable in money damages. The decision is inconsistent with *United States* v. *Testan*, 424 U.S. 392 (1976), as reaffirmed in this Court's decision in *United States* v. *Mitchell*, 445 U.S. 535 (1980). Even more than its *Mitchell I* decision, the present decision of the Court of Claims

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[10] The court simply found no indication that contracts creating management duties existed, noting that the powers of attorney pursuant to which the Secretary acted for individual allottees contained no such terms, and that the timber sales contracts themselves ran between the Indian owners and the timber companies and are not enforceable against the United States. A contract implied in law would not support relief, the court observed, granting respondents leave, however, to amend their petitions to allege, and demonstrate the existence of actual expressed or implied-in-fact contracts (App. A, *infra*, 22a).

threatens to subject the United States to substantial liabilities without the necessary congressional authorization.

1. In *United States* v. *Mitchell, supra*, 445 U.S. at 538, quoting *United States* v. *King*, 395 U.S. 1, 4 (1969), this Court reiterated the fundamental rule that "[a] waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.'" The controlling principle is simply that, where, as here, a claim for money damages is based on a statute, there is no waiver of immunity, unless the statute "'in itself * * * can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.'" *United States* v. *Testan, supra*, 424 U.S. at 402, quoting *Eastport S.S. Corp.* v. *United States*, 372 F.2d 1002, 1008-1009 (Ct. Cl. 1967).[11]

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[11] Here we follow the terminology of this Court's *Testan* and *Mitchell* opinions by speaking of a failure to waive the bar of sovereign immunity. In *Testan* the court stated that the Tucker Act is merely "jurisdictional," intimating that it does not effect a waiver of sovereign immunity. 424 U.S. at 398, 400. And in *Mitchell* the court repeated that the respondents "must look beyond the jurisdictional statute [the Tucker Act] for a waiver of sovereign immunity with respect to their claims." 445 U.S. at 538. Technically, we think it more accurate to say that the Tucker Act itself effects a conditional waiver of the otherwise absolute immunity of the United States from being sued eo nomine. See, *e.g.*, *United States* v. *Sherwood*, 312 U.S. 584, 590 (1941). The waiver is effective whenever an independent basis for recovery of damages exists, be it a contract, the government's retention of funds owned by the claimant (see *United States* v. *Testan, supra*, 424 U.S. at 400), or another statute that creates a right of action in damages against the United States for breach of a statutory command (*ibid.*). But it cannot matter how the point is articulated. It is entirely clear that no recovery can be had under the Tucker Act in respect of a claim founded upon an

a. Although the Court of Claims recognized that none of the statutes from which it pieced together authority to award damages against the United States expressly provides for maintenance of such suits, it reasoned (App. A, *infra*, 4a) that the necessary consent to suit may be inferred from a statute that directs payment of a particular sum of money to an individual. With this we have no quarrel, for a statute that creates a right to payment of money can fairly be interpreted as mandating the availability of a damages remedy; without the damages remedy the substantive right would be empty. See, *e.g.*, *United States* v. *Hvoslef*, 237 U.S. 1, 10 (1915); *Medbury* v. *United States*, 173 U.S. 492, 497 (1899); *Mosca* v. *United States*, 417 F.2d 1382, 1385 (Ct. Cl. 1969); *Gnotta* v. *United States*, 415 F.2d 1271, 1278 (8th Cir. 1969), cert. denied, 397 U.S. 934 (1970); see also *Jacobs* v. *United States*, 290 U.S. 13, 16 (1933) (Just Compensation Clause of Fifth Amendment imports a right to recover damages for an uncompensated taking by physical invasion). It does not follow, however, as the Court of Claims reasoned (App. A, *infra*, 5a-6a), that it is equally immaterial that the statute upon which the claim is grounded does not confer a monetary right at all.

Act of Congress unless the statute invoked, construed in the conservative manner appropriate to a waiver of sovereign immunity (see *United States* v. *Sherwood*, *supra*, 312 U.S. at 590-591), can be said to make the United States answerable in damages for the conduct of federal officials in violation of the particular statute. *United States* v. *Testan*, *supra*, 424 U.S. at 400. It goes without saying that the semantic reformulation we propose would not call in question the fundamental reasoning, much less the result, of *Testan*, this Court's earlier *Mitchell* decision, or any other of this Court's decisions.

On the contrary, while it may not be dispositive in every case, the monetary character of the right is a strong indication that a statute may " 'in itself * * * fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.' " *United States* v. *Testan*, *supra*, 424 U.S. at 401-402, quoting *Eastport S.S. Corp.* v. *United States*, *supra*, 372 F.2d at 1008-1009. By contrast, where, as here, the duties imposed by a statute are not essentially monetary in character, but require implementation through conduct by federal officials, the contrary inference arises: that Congress, by its silence as to a damages remedy, created only a substantive right enforceable through declaratory or injunctive relief. See *United States* v. *Testan*, *supra*, 424 U.S. at 403.[12] Accordingly, the Court of Claims' entire analysis rests upon an unsound foundation.[13]

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[12] Indeed, while refusing to approve the result therein, the *Testan Court* (424 U.S. at 402) distinguished *Selman* v. *United States*, 498 F.2d 1354 (Ct. Cl. 1974), on precisely this basis.

[13] The Court of Claims' analysis is also at odds with this Court's recent decisions refusing to imply a private right of action from federal statutes that, on their face provide no such remedy. See, *e.g.*, *California* v. *Sierra Club*, 451 U.S. 287 (1981); *Universities Research Association* v. *Coutu*, 450 U.S. 754 (1981). Those cases may be instructive in this context, for here, too, the "ultimate question is one of congressional intent, not one of whether this Court thinks it can improve upon the stautory scheme that Congress enacted into law." *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 578 (1979). Implication of a damages remedy against the United States from a statute silent on that subject is particularly to be disfavored, however, because congressional intent must be determined against the background of the "presumption" that the United States has not consented to suit. *Eastern Transportation Co.* v. *United States*, 272 U.S. 675, 686 (1927). As Judge Nichols persuasively argued in his dissent, the right of action implied by the court below "is in cold reality but a strong and clear wish upon the judge's part" (App. A, *infra*, 25a).

b. The result reached by the Court of Claims is inconsistent with the sovereign immunity principles rehearsed above, for none of the statutes from which the Court of Claims inferred a right to hold the United States accountable in damages, provides the necessary "unequivocally expressed" consent to suit against the United States. For instance, the timber management statutes, 25 U.S.C. 406 and 466 (see App. B, *infra*, 43a-44a, 46a), empower the Secretary to sell timber on allotted lands, provide a generalized standard to guide him in doing so (25 U.S.C. 406 (a)),[14] and require adherence to the principles of sustained yield management (25 U.S.C. 466). Within these confines, the Secretary retains substantial discretion. The only monetary obligation placed upon the Secretary, moreover, is to pay "the proceeds from such sales, after deductions for administrative expenses to the extent permissible under [25 U.S.C. 413] * * * to the owner or owners" or otherwise to "dispose[] of [such proceeds] for their benefit under regulations to be prescribed by the Secretary * * *." 25 U.S.C. 406(a). Thus, while we assume that Section 406(a) would ground an action to compel the Secretary to disgorge unlawfully retained proceeds, or, presumably, to refund unlawfully high administrative fees, there is no basis in the statute for extending the monetary remedy to proceeds that arguably should have been, but were not, captured, by the Secretary. Indeed, the express mention of a right to receive the benefits of revenues actually garnered by the Secretary suggests, on the contrary, that this is the limit of the damages action implicitly authorized by Congress.

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[14] As is noted above (pages 3-4 & notes 2 & 3) that standard was not in place until 1964.

The same observation applies to the road building and right of way statutes (see App. B, *infra*, 46a-48a) relied upon by the Court of Claims (App. A, *infra*, 15a-16a). Section 318a of Title 25 merely authorized appropriations for building of roads on Indian reservations. It cannot be inferred from the bare statutory language that a right to recover such funds in damages is created. Sections 323 through 325 empower the Secretary to grant rights-of-way over tribal and individual lands (25 U.S.C. 323) subject, in most cases, to the owner's consent (25 U.S.C. 324), and subject to the requirement that there be paid to the Secretary "such compensation as the Secretary * * * shall determine to be just," with the proceeds to be disposed of under the Secretary's regulations (25 U.S.C. 325). We assume that the latter provision would ground an action to recover proceeds of a right-of-way sale wrongfully withheld from the Indians over whose lands it was granted. It does not follow, however, that damages for failure to secure more generous compensation are available. Indeed, the explicit statutory recognition (25 U.S.C. 325) of the Secretary's authority to determine the amount of just compensation militates powerfully against the damages remedy for insufficient compensation created by the Court of Claims. And there is even less basis for inferring from those statutes, as the Court of Claims did, a right to recover damages for the Secretary's alleged failure to plan and build an optimal road network, or properly to maintain rights of way (see App. A, *infra*, 15a-16a).[15]

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[15] Like claims for excessive administration fees, respondents' claim for recovery of excessive deductions from the timber revenues withheld for road building may be maintainable on the theory that recovery of funds unlawfully retained is

Finally, although the question is closer, we submit that the Court of Claims' implication of a right to recover damages for payment of a less than optimal interest rate, is not supported by 25 U.S.C. 162a. Rather than compelling a particular level of compensation, the language of the statute (App. B, *infra*, 48a-50a) affords the Secretary substantial discretion as to the investments to be made of Indian funds. Accordingly, while failure to apply to the claimants' account interest monies actually earned would likely give rise to a right to redress in damages, no right to recover in damages any shortfall from an optimal level of interest payments can fairly be discerned from the statute.

b. As we have shown, "[n]othing on the face" of any of the statutes at issue (*Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 59 (1978)) can "fairly be interpreted as mandating compensation" for the conduct alleged by respondents, as *Testan* requires. To be sure, the statutes involved here, or at least some of them, create substantive duties that the Secretary must fulfill. But this could equally be said of the Classification Act, considered in *Testan*, which unambiguously requires that pay classification ratings of federal employees be carried out pursuant to the principle of "equal pay for substantially equal work" (5 U.S.C. 5101(1)(A)). Although Testan alleged a violation of the Act, the Court concluded that a back pay remedy was unavailable, rejecting the notion that the substantive right necessarily imports a damages remedy. 424 U.S. at 400-403. The Court of Claims' reasoning in the instant case, however, as in its

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sought. Nothing in 25 U.S.C. 318a, or Sections 323-325, however, supports a claim that road building charges are per se unlawful.

Mitchell I decision (see page 6, *supra*), rests largely upon the court's view that an injunctive remedy is inadequate to redress the violations alleged (App. A, *infra*, 12a-13a)—precisely the inference rejected in *Testan*.

Moreover, here, as in *Testan*, *supra*, 424 U.S. at 403:

> [t]he situation * * * is not that Congress has left the respondents remediless, * * * but that Congress has not made available * * * the remedy of money damages * * *.

Respondents are not wholly without recourse against what they take to be violations of the various management statutes upon which they rely. Rather, violations of duties imposed by the various statutes in issue may be cured by actions for declaratory, injunctive or mandamus relief against the Secretary. See 5 U.S.C. 702, 706; 28 U.S.C. 1331(a), 1361. In *Paganab* v. *Hitchcock*, 202 U.S. 473 (1906), it is true, the Court dismissed as an unconsented suit against the United States, an action by Indians to enjoin the Secretary from implementing regulations prohibiting certain exploitative and unsound forestry practices on Indian lands. The authority of that case, however, has been eroded by subsequent decisions of this Court, and by the enactment of legislation, including the Administrative Procedure Act in 1946. While it may not now be possible to redress injuries occurring long ago by injunctive relief, the fact remains that the respondents were not powerless to protect themselves from the wrongs alleged.[16]

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[16] In any event, in the typical case, the retrospective reach of a damages remedy would also be limited—by the six year statute of limitations. 28 U.S.C. 2501.

2. The fact that respondents are Indians ought not alter the result. So far as the availability of money damages is concerned, Indians are situated no differently than any other claimant against the United States—except as special legislation expressly provides for monetary awards.

a. It has long been established that the relationship between the United States and the Indian tribes is a special one, that has been variously described by this Court as a "fiduciary," "guardianship" or "trust" relationship. See, *e.g.*, *United States* v. *Mason*, 412 U.S. 391, 398 (1973); *Seminole Nation* v. *United States*, 316 U.S. 286, 296-297 (1942); *Minnesota* v. *United States*, 305 U.S. 382, 386 (1939); *United States* v. *Shoshone Tribe*, 304 U.S. 111, 117-118 (1938); *United States* v. *Candelaria*, 271 U.S. 432, 442 (1926); *McKay* v. *Kalyton*, 204 U.S. 458, 469 (1907); *Minnesota* v. *Hitchcock*, 185 U.S. 373, 396 (1902); *United States* v. *Kagama*, 118 U.S. 375, 382-384 (1886); *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17 (1832). We fully accept the implications of that special relationship and the obligations that go with it. Nor do we deny that these duties may be invoked to flesh out the skeletal mandate of various statutes that authorize the Secretary to act in Indian affairs, providing, in appropriate cases, the "law to apply" (*Citizens to Protect Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 410 (1971); see 5 U.S.C. 701(a)(2)) in actions for declaratory or injunctive relief from administrative action. But it simply does not follow that every such Act of Congress constitutes the "affirmative statutory authority" necessary to maintain an action for damages against the United States. *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 513-514 (1940); see also

United States v. *Shaw*, 309 U.S. 495, 500, 502 (1940); *Munro* v. *United States*, 303 U.S. 36, 40-41 (1938).[17]

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[17] Because the decision below premises liability on alleged violations of more or less particularized *statutory* duties, we need not address the question whether the United States is accountable in damages for breach of its more generalized obligations as "guardian" or "trustee" of Indian property interests. It is worth noting, however, that this Court has never so held. Instead, this Court's cases invoke the fiduciary relation (1) to preclude unauthorized state interference in the relations between the United States and the Indian tribes or other unauthorized exercise of state jurisdiction on Indian lands (see, *e.g.*, *Cherokee Nation* v. *Georgia*, *supra*, 30 U.S. (5 Pet.) at 17; *United States* v. *Kagama*, *supra*, 118 U.S. at 382-384), (2) to bar or nullify exercises of state court jurisdiction in matters affecting Indian property rights, in which the United States was not properly joined or represented (see, *e.g.*, *Minnesota* v. *United States*, *supra*, 305 U.S. at 386; *United States* v. *Candelaria*, *supra*, 271 U.S. at 442; *McKay* v. *Kalyton*, *supra*, 204 U.S. at 469), (3) to interpret doubtful or ambiguous treaty language in favor of the Indians (see, *e.g.*, *United States* v. *Shoshone Tribe*, *supra*, 304 U.S. at 117-118; *Minnesota* v. *Hitchcock*, *supra*, 185 U.S. at 396), (4) to limit the United States' liability for damages under the Just Compensation Clause where, acting as a fiduciary manager, it has converted the form of Indian property (compare *Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1903) with *United States* v. *Sioux Nation of Indians*, 448 U.S. 371 (1980)), and finally (5) to emphasize the high standard of care that the United States is obliged to exercise in carrying out its duties respecting the Indians (see, *e.g.*, *United States* v. *Mason*, *supra*, 412 U.S. at 398; *Seminole Nation* v. *United States*, *supra*, 316 U.S. at 296-297).

To be sure, the last two cited decisions involved claims for money damages, but no argument was made in either case that damages were unavailable as a remedy and the Court did not address that question in either case. In any event, *Seminole Nation* was maintained pursuant to special jurisdictional acts that provided the necessary consent to suit. 316 U.S. at 288-289 & n.2; see also *United States* v. *Seminole Nation*, 299 U.S.

On the contrary, the requirement of unequivocal congressional consent to suit against the United States is fully applicable to Indian claimants. See, *e.g.*, *Klamath Indians* v. *United States*, 296 U.S. 244, 250, 255 (1935); *Blackfeather* v. *United States*, 190 U.S. 368, 376 (1903). In each case, the question is whether the particular statute invoked "'in itself * * * can fairly be interpreted as mandating compensation.'" *United States* v. *Testan*, *supra*, 424 U.S. at 402.

b. The fact that respondents are Indians is not without bearing, however, on the question whether the statutes upon which respondents rely implicitly grant the right to recover damages against the United States. In resolving the underlying issue of

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417, 419 (1937). Moreover, the Court's discussion of the government's fiduciary duty in *Seminole Nation*, *supra*, 316 U.S. at 296-297, referred to a claim to compel payments expressly prescribed by Treaty, as to which no special jurisdiction provision would today be necessary.

In *United States* v. *Mason*, the United States did not assert that damages were an unavailable remedy, but only that its failure to challenge assessment of state taxes against an estate, including allotted lands, was not a breach of trust duty, because the United States had acted in reliance upon a subsisting decision of this Court in paying the taxes in question. Because of the sufficiency of this defense on the merits, there was no occasion to argue, or to decide, whether damages could be assessed for a breach of duty. The language that is usually cited from *Mason* ("There is no doubt that the United States serves in a fiduciary capacity with respect to these Indians and that, as such, it is duty bound to exercise great care in administering its trust." 412 U.S. at 398), carries no necessary implication that the remedy available for breach of this duty is damages. Rather, it is our contention, that, like the unequivocal statutory command of the Classification Act considered in *Testan*, this language merely reflects the existence of a substantive duty, which may be enforced by non-monetary remedies in a proper case.

congressional intent, we cannot ignore that, when most of the statutes now invoked were adopted, the prevailing legal regime generally deprived Indian claimants of any monetary remedy against the United States.

Until 1946, the Court of Claims could not have, in any event, entertained these claims absent a special jurisdictional Act. Section 9 of the Act of March 3, 1863, ch. 92, 12 Stat. 766 (Rev. Stat. 1066 (1878 ed.)) provided that the jurisdiction of the Court of Claims

> shall not extend to or include any claim against the Government not pending in said court on [December 1, 1862] growing out of or dependent upon any treaty stipulation * * * with the Indian tribes.[18]

Moreover, the Court of Claims had concluded that even non-treaty Indian tribal claims not be maintained without a special jurisdictional act. See, *e.g.*, *Choctaw & Chickasaw Nations* v. *United States*, 75 Ct. Cl. 494, 498-501 (1932).[19] In that setting, it is most unlikely that Congress intended to create a right to recover damages against the United States in 1910 by enacting 25 U.S.C. 407, which authorizes

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[18] This disability was continued by Section 153 of the Judicial Code of 1911, ch. 231, 36 Stat. 1138, and Section 1502 of the Judicial Code of 1948, ch. 646, 62 Stat. 942. Although the 1946 Indian Claims Commission Act plainly was intended to overcome this disability (see *United States* v. *Mitchell*, *supra*, 445 U.S. at 538-540 & n.2), this provision was only repealed by adoption of the Act of May 24, 1949, ch. 139, Section 88, 63 Stat. 102.

[19] Congress' awareness of this situation, and its intent to alter it, is reflected in the legislative history of the Indian Claims Commission Act of 1946. See, *e.g.*, H.R. Rep. No. 1466, 79th Cong., 1st Sess. 2 n.2 (1945).

the Secretary to sell timber on tribal lands, or in 1934 by enacting 25 U.S.C. 466, the sustained-yield requirement, which also applies to unallotted lands. And there is no evidence that a different result was expected to follow as to allotted lands covered by 25 U.S.C. 406(a), enacted as a companion to Section 407, or as to allotted lands under 25 U.S.C. 466. Similarly, it is highly improbable that Congress meant to create a money damages remedy in 1938, by enacting 25 U.S.C. 162a, governing investment of both tribal and individual funds.

3. The decision of the Court of Claims creates an unprecedented potential liability by subjecting the United States to claims for money damages for violation of statutory obligations owed to Indians. Damages claimed in this suit alone may aggregate $100 million and other similar claims will assuredly follow in its wake. In *Duncan* v. *United States*, 667 F.2d 36 (1981), relying upon its *Mitchell II* decision, the Court of Claims has held the United States liable for damages respecting a diversity of injuries alleged to have befallen Indian claimants after their rancheria, one of a species of small reservations found in California, was terminated without compliance with a statutory precondition.[20] As we explain in our petition for a writ of certiorari in *Duncan*, filed simultaneously with this petition, the Court of Claims' decision there makes clear that under its *Mitchell II* decision that court will almost invariably hold the United States accountable in damages for any

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[20] An earlier decision in *Duncan*, 597 F.2d 1337 (1979), was vacated and remanded to the Court of Claims for reconsideration in light of this Court's *Mitchell* decision. *United States* v. *Duncan*, 446 U.S. 903 (1980).

statutory violation affecting the welfare of Indian claimants.[21]

The question presented here is thus of substantial importance. Because *Mitchell* and *Duncan* together reveal the extent of the Court of Claims' departure from settled principles respecting waivers of sovereign immunity, we suggest that plenary considerations of the two cases, in tandem, is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 1982

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[21] A copy of our petition in *Duncan* has been served upon the present respondents.

Appendix

APPENDIX A

IN THE UNITED STATES COURT OF CLAIMS

Nos. 772-71, 773-71, 774-71 and 775-71

(Decided October 21, 1981)

HELEN MITCHELL, ET AL.

v.

THE UNITED STATES

Before FRIEDMAN, *Chief Judge*, COWEN, *Senior Judge*, DAVIS, NICHOLS, KUNZIG, BENNETT and SMITH, *Judges*, *en banc*.

ON DEFENDANT'S MOTION TO DISMISS

DAVIS, *Judge*, delivered the opinion of the court:

In *United States* v. *Mitchell*, 445 U.S. 535 (1980), the Supreme Court reversed and remanded our prior decision in 219 Ct. Cl. 95, 591 F.2d 1300 (1979). We had held that plaintiff Indians could sue the United States for breach of trust relating to federal management of their forest properties, under the trust created in the General Allotment Act, 25 U.S.C. §§ 331-358, but the Supreme Court ruled, to the contrary, that the trust established by that Act did not extend to the management of the allotted lands.[1]

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[1] The Court held, 445 U.S. at 546, that, on the basis of its objectives and its legislative history and background, the General Allotment Act "cannot be read as establishing that

The case was remanded to this court to consider plaintiffs' other grounds (which we had not reached) for asserting that the Government is liable in money damages for the alleged mismanagement. 445 U.S. at 546 n.7. On remand, we had argument *en banc* and, except for specified issues, reargument *en banc*. We now hold that plaintiffs are entitled to proceed on most, but not all, of their specific claims (apart from the rejected broad-scale claim under the General Allotment Act). Accordingly, we deny, in largest part, defendant's motion to dismiss.

I

The now relevant facts and allegations are set forth in the Supreme Court's opinion, 445 U.S. at 536-537 and our previous decision, 221 Ct. Cl. at ——, 591 F.2d at 1300-1301. The claims are by Indian allottees of trust lands and timber on the Quinault reservation and by the tribe itself, under the Tucker Act, 28 U.S.C. § 1491 (1976), and its counterpart for Indian tribal claimants, 28 U.S.C. § 1505 (1976). The land is heavily timbered and under various statutes the Federal Government manages it, receives powers of attorney from Indian allottees, contracts for harvesting of timber, and pays the money proceeds to the allottees. Plaintiffs seek to recover from the United States for various alleged deficiencies, including failure to obtain fair market value for timber sold, failure to manage the forests on a sustained yield basis and to rehabilitate the land after logging, failure to obtain any payment or proper payment for some merchantable timber, failure to develop

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the United States has a fiduciary responsibility for management of allotted forest lands." *See also* 445 U.S. at 542, for the same conclusion.

a proper system of roads and easements and exacting improper charges in connection with roads and easements, failure to pay any interest or sufficient interest on monies and funds, exacting excessive administrative fees and charges, and failure to exercise proper care in granting patents to Indians.

Defendant's motion before us asserts that we have no authority to consider these nonconstitutional claims against the United States, except perhaps for any which may truly relate to plaintiffs' own monies which have been actually retained or deducted by the Government.

II

The barrier defendant sees is that, in its view, Congress has not consented to such a suit here, either in 28 U.S.C. § 1491 or § 1505, or through any other statute or regulation which plaintiffs invoke. The concept has been phrased in different ways, but the Supreme Court has firmly established that, for a suit against the United States, there must be a waiver of sovereign immunity shown by "clear congressional consent." *United States* v. *Mitchell*, 445 U.S. at 538. For claims not resting on a contract or for the return of money paid to the Government, but, rather, directly founded on or arising under the Constitution, statutes, regulations, or executive orders, the claimants—Indian or not, individual or tribal—must "look beyond [28 U.S.C. §§ 1491, 1505] for a waiver of sovereign immunity with respect to their claims." *Id.*, at 538-540. Those substantive rights against the Government for monetary relief must exist apart from §§ 1491 and 1505. To allow the claim here in those instances, the Constitution, statute, regulation or order must be capable of being fairly "interpreted as mandating compensation by the Federal Government for the

damage sustained." *United States* v. *Testan*, 424 U.S. 392, 400 (1976). It is not enough that the statute (for instance) may ground a claim for specific relief (*e.g.* injunction, mandamus, or direct statutory review); it is also necessary, for action in this court, that the substantive right granted by Congress extend to entitlement to compensation or money damages. *Cf. United States* v. *Testan*, *supra*, 424 U.S. at 401-02, incl. n.5; *Eastport S.S. Corp.* v. *United States*, 178 Ct. Cl. 599, 608-09, 372 F.2d 1002, 1009-10 (1967).

It is not required, however, that the statute, regulation, or order itself specify that the claimant can bring a lawsuit for compensation in this court (or in the district court if under $10,000). If the source of the substantive right can be fairly read as mandating compensation by the Government, it is needless for Congress to add expressly in that statute that suit may be maintained in this court (or elsewhere) to obtain such monetary compensation. The Tucker Act (28 U.S.C. § 1491) and 28 U.S.C. § 1505 perform that function of giving Congressional consent to jurisdiction in this court over such pecuniary claims. Classic instances of legislation directing compensation, and therefore grounding suit in this court, are the statutes providing for military and civilian pay and allowances (which have not, of course, themselves mentioned suit or the right to sue).[2] Aside from the few instances of gratuitous benefits in which Congress has provided against any judicial scrutiny at

[2] The recent Civil Service Reform Act of 1978 does provide specifically for judicial review in this court but obviously that late enactment does not invalidate, or cast doubt on, the hundreds of military and civilian "pay" cases which this court has heard and decided in the preceding decades.

all (*e.g.* veterans' benefits), a clear showing that legislation directs compensation or money to be paid to the claimant is enough warrant for a suit in this court under §§ 1491 and 1505.

Nor do we think that the only statutes[8] mandating compensation are those which expressly authorize the payment of the money sought (and proved). As we understand them, neither *Testan* nor *Mitchell*, *supra*, excludes all non-express indications of the right to compensation, no matter how strong or compelling they may be. Both opinions teach us to look hard and carefully to see whether the statute should fairly be read as mandating compensation—*i.e.*, that reading should be strong and clear—but the Supreme Court's decisions do not say that the substantive right to money must always be explicitly stated in the substantive legislation itself. The overriding principle, rather, is that the statute should be read "with that conservatism which is appropriate in the case of a waiver of sovereign immunity" *United States* v. *Sherwood*, 312 U.S. 584, 590 (1941). In *Testan*, for instance, the Court considered all the factors, including but not limited to the absence of an express legislative statement that pay is due for improper classification and the established rule that one is not entitled to the benefit of a position to which one has not been appointed, in deciding that neither the Classification Act nor the Back Pay Act mandated or allowed compensation in those circumstances. *Mitchell* spoke of "clear" Congressional consent (445 U.S. at 538) and, employing that standard, concluded that the present plaintiffs have no substantive right at all under the General Allotment Act with regard to the

[8] We shall often use "statutes" as exemplifying and standing for comparable regulations or orders.

alleged mismanagement of their forests and property for which they have brought suit. *See* note 1, *supra*. Neither ruling laid down the inexorable requirement of express statement in the legislation of the right to monetary compensation. The only inescapable principle is that Congress's waiver of sovereign immunity with respect to money compensation must be clear or strong before the court can say that the statute mandates compensation.[4]

III

In *Mitchell* the Supreme Court remanded to us the question whether the other statutes on which these Indians rely created or recognized fiduciary responsibility on the part of the Government for management of the forest lands, or otherwise render the United States liable in money damages for the alleged mismanagement. In this Part III, we consider the three of those statutes which deal directly with federal management of the plaintiffs' forests and lands.[5]

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[4] In refusing to accord us jurisdiction beyond that historically recognized in this court, the Supreme Court may be said sometimes to have rested almost exclusively on the absence of an express Congressional statute waiving sovereign immunity. *United States* v. *King*, 395 U.S. 1, 4-5 (1969) (lack of declaratory judgment power); *Soriano* v. *United States*, 352 U.S. 270, 276 (1957) (non-tolling of limitations beyond statutory provisions). But this extremely strict requirement of an express statute, if it be a true *sine qua non* at all, has not, we think, been extended to a *substantive* claim within the Tucker Act—*e.g.* a monetary claim founded on an Act of Congress. *Cf. United States* v. *Emery, Bird, Thayer Realty Co.*, 237 U.S. 28, 32 (1915).

[5] The remaining statutes are discussed in Part IV, *infra*; the constitutional and contractual claims are touched on in Part V, *infra*; exhaustion of administrative remedies is considered in Part VI, *infra*.

These three are: the so-called 1910 Act, 25 U.S.C. §§ 406-407 (1976) (timber sales); 25 U.S.C. § 466 (1976) (regulations and sustained yield); and 25 U.S.C. §§ 318a, 323-325 (1976) (rights-of-way). We hold that (a) these statutes, giving federal officials full authority to manage Indian forest property and land, created a fiduciary relationship; (b) plaintiffs can recover (if they prove their case) for breach of these fiduciary obligations and obtain the compensation provided by the statutes; but that (c) the recovery will not necessarily be equivalent to that imposed on a private trustee managing his beneficiary's property, but will be limited in reach and scope, though more extensive than defendant would allow.

A. The Government's supervision and control of the harvesting of Indian timber for the Indians' benefit—including the impact of the particular statutes invoked by plaintiffs and the regulations under them—has recently been reviewed in detail by the Supreme Court, *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 145-148 (1980), in connection with the effect of state taxes on the entire process of managing forest lands. The Court termed this over-all federal control "comprehensive," involving "day-to-day supervision by the Bureau of Indian Affairs," and giving the Secretary of the Interior "broad authority over the sale of timber on the reservation." *Id.* at 145. The statutes provide that timber sales must "be based upon a consideration of the needs and best interests of the Indian owner and his heirs," 25 U.S.C. § 406(a), and call for Interior's rules and regulations relating to "the operation and management of Indian forestry units" to be made "on the principle of sustained yield management." 25 U.S.C. 466. The Secretary is thus specially authorized to promulgate regulations for the operation and

management of Indian forestry units, and he has done so in a detailed set. *White Mountain Apache Tribe, supra,* at 146-48. We note, in addition, that the proceeds of timber sales from Indian forest lands are to "be paid to the owner or owners or disposed of for their benefit" under the Secretary's regulations, § 406(a), or (in the case of tribal ownership) are to "be used for the benefit of the Indians who are members of the tribe or tribes concerned in such manner as [the Secretary] may direct," § 407.

The *White Mountain Apache Tribe* opinion summed up the "overriding federal objective" to be: "guaranteeing Indians that they will 'receive * * * the benefit of what profit [the forest] is capable of yielding * * *'" (quoting the Secretary's own regulations), and declared that "the Federal Government has undertaken to regulate the most minute details of timber production and expressed a firm desire that the Tribe should retain the benefits derived from the harvesting and sale of reservation timber." 448 U.S. at 149.

B. Because the forest and property are Indian-owned, this Congressional legislation, envisaging comprehensive operation and management by the Government for the Indians' benefit, created a fiduciary relationship between Interior and the Indians. We have held that "where the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection." *Navajo Tribe of Indians* v. *United States,* 224 Ct.

Cl. ——, ——, 624 F.2d 981, 987 (1980). This principle has dominated the Government's relations with Indian property for about two centuries. *See, e.g., Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831); *United States* v. *Kagama*, 118 U.S. 375, 382 (1886); *United States* v. *Payne*, 264 U.S. 446, 448 (1924); *Seminole Nation* v. *United States*, 316 U.S. 286, 296-97 (1942); *United States* v. *Mason*, 412 U.S. 391, 398 (1973). The long-continuing doctrine of governmental fiduciary obligation in the management of Indian property was, we think, infused into the 1910 and later statutes, even though the word "trust" was not used in that legislation. The General Allotment Act did not itself establish a fiduciary obligation for management of these forest lands (*United States* v. *Mitchell*, *supra*, 445 U.S. 535), but the later Acts we have mentioned (and the ensuing regulations), which dealt specifically with the Indians' forests, have broadened the special trust imposed by the Allotment Act to create a general fiduciary obligation on the Government in the management and operation of the forest lands with which Interior was entrusted. Nothing in those three Acts says or suggests that Congress wished, contrary to historical principle, to depart from the norm of fiduciary duty. *See United States* v. *Anderson*, 625 F.2d 910, 915 (9th Cir. 1980), *cert. denied*, 101 S.Ct. 1367 (1981).[6]

c. The crucial question is whether, and to what extent, Congress has consented to a monetary claim in this court by the Indian plaintiffs for alleged viola-

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[6] The *Anderson* court said that 25 U.S.C. § 466, *supra*, with its broad-scale direction to the Secretary to make rules and regulations (under prescribed standards) for the operation and management of Indian forestry units, involved an undertaking by the Government to manage the land resources of the Indians for the Indians' optimum economic benefit."

tion of those fiduciary duties. Under the wider statutory provisions relating to pre-August 1946 claims filed before the Indian Claims Commission (*United States* v. *Mitchell, supra*, 445 U.S. at 540 n.2), there is no question that such a suit could be brought before the Commission (and continued in this court as the Commission's successor). *Navajo Tribe of Indians* v. *United States, supra.* But the current claims, which arose after 1946 and were filed here in 1971, are controlled by the narrower provisions of 28 U.S.C. §§ 1491 and 1505. *See Menominee Tribe of Indians* v. *United States*, 221 Ct. Cl. ——, ——, 607 F.2d 1335, 1340-41 (1979), *cert. denied*, 445 U.S. 950 (1980). For recovery (as we said in Part II, *supra*), a statute or authorized regulation must clearly mandate compensation.[7]

We think that Congress did mandate, in the three sets of statutes to which we have referred *supra*,[8] a restricted degree of compensation for violations of traditional fiduciary responsibilities in the management of Indian property. These are therefore claims for monetary compensation founded on, and mandated by, Congressional legislation. The ultimate principle we find in these Acts is that plaintiffs can sue under that legislation both for (a) any fall-off

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[7] Again we by-pass (see our prior *Mitchell* opinion, 219 Ct. Cl. at ——, 591 F.2d at 1301-02) the phrase in 28 U.S.C. § 1491 giving this court jurisdiction over claims against the United States for "liquidated or unliquidated damages in cases not sounding in tort." Plaintiffs do not rely on that clause which has never been fully and authoritatively construed but rather on specific legislation as founding their claims.

[8] 25 U.S.C. §§ 318a, 323-325, 406-407, 466. *See* text at note 5, *supra.*

from the income they would have received from their forests and lands if the Government had properly complied with the directives of the statutes and regulations, and (b) the value (or decrease in value) of their property which is lost (or diminished in value) through improper actions of Interior. But there can be no recovery for other, consequential, indirect damages which a private cestui might possibly recover because of his trustee's derelictions. We now consider the three statutes in turn.

1. *25 U.S.C. §§ 406-407 (timber sales)*: As we have pointed out, this legislation (originally enacted in 1910) expressly requires the proceeds of timber sales made by the Government from the individual plaintiffs' lands to "be paid to the owner or owners or disposed of for their benefit under regulations to be prescribed by the Secretary of the Interior", § 406 (a), and (in the case of the tribe) the proceeds are to "be used for the benefit of the Indians who are members of the tribe or tribes concerned in such manner as [the Secretary] may direct," § 407. These provisions indisputably direct compensation (and therefore allow suit) for the actual proceeds of actual sales not remitted to or used for the Indians. But that is not the outermost limit of the Indians' right to sue in this court. Congress had a longer reach. It created a fiduciary relationship through this statute and required that sales must "be based upon a consideration of the needs and best interests of the Indian owner and his heirs." § 406(a). That was always the ultimate goal. The first (1911) Interior Department regulation declared that the legislation called upon Interior to "so manag[e] the Indian forests as to obtain the greatest revenue for the Indians consistent with a proper protection and improvement of the forests."

Having imposed this umbrella of fiduciary relationship and given Interior comprehensive over-all authority for the Indians' benefit, Congress did not, we think, confine the Indians to the actual proceeds of actual sales, barring them entirely from seeking (under the proper standard, *see* Part III, D, *infra*) compensation for other violations by Interior of its fiduciary duty "to obtain the greatest revenue for the Indians consistent with a proper protection and improvement of the forests," *Id.* To us, Congress has authorized the Indians to claim compensation for a breach of the trust Congress has itself fixed in order that the beneficiaries shall receive the benefit Congress plainly contemplated for them. A trust normally entails the right to compensation for the trustee's breach (G. BOGERT, THE LAW OF TRUSTS & TRUSTEES § 862 (2d ed. 1965); 3 A. SCOTT, THE LAW OF TRUSTS § 205 (3d ed. 1967)), and this statute does not in any way suggest otherwise. Under the terms of the statute therefore, plaintiffs can recover the difference between the actual proceeds and the greatest appropriate revenue which should have been obtained. The statutory term, "proceeds" of tribe sales, can and should be read, in context, as the proceeds of the sales which should have been made under proper management—not merely the actual proceeds of actual sales.

If we were to confine suit to the bare actual proceeds received from actual sales, we would exclude those of plaintiffs' claims that assert that the Government failed (i) to obtain fair market value, or any compensation at all, for some of the timber, and (ii) to follow the regulations in making advance payments to the plaintiffs so that they received payments late (and therefore their gains were unlaw-

fully diminished). There is no reason to think that Congress mandated compensation for a failure to turn over actual proceeds of actual sales but not for these other, intimately related failures. In the light of the fiduciary relationship, that would be extraordinary and without any reason given.

2. *25 U.S.C. § 466 (regulations and sustained yield)*: This statute (first passed in 1934) directs Interior to manage Indian forests "on the principle of sustained yield management."[9] Congress considered this necessary to "assure that the Indian forests will be permanently productive and will yield continuous revenue to the tribes." 78 Cong. Rec. 11730 (1934). *Cf. White Mountain Apache Tribe* v. *Bracker*, *supra*, 448 U.S. at 146. This 1934 Act plainly implemented the timber sales provisions (discussed *supra*) already in existence since 1910. *See* 78 Cong. Rec. 11730 (1934). These statutes and the relevant regulations, fairly read together, mandate compensation for improper Interior activity, contrary to fiduciary obligations imposed by the legislation and regulations, which has led to the direct loss, or diminution in value, of the plaintiffs' forests or the proper gain from those forests.

Congress wanted not only to protect Indian forests land from a value-loss occasioned by improper Government violation of sustained yield principles but also to compensate the Indian owners[10] for the amount of that unwarranted value-loss if it should

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[9] 25 U.S.C. § 407, relating to the sale of timber on unallotted lands, also provides that the timber "may be sold in accordance with the principles of sustained yield * * *."

[10] In 1934, when this statute was passed, the only Indian owners who could sue were individuals, but 28 U.S.C. § 1505 gave that opportunity to Indian tribes in 1946.

be proved. This was Indian property and any remedy there might be through prospective affirmative relief would often be too late for much, if not most, of the injury.[11] Interior had been given fiduciary responsibilities for which pecuniary remedies are commonly available in our general law. Without a monetary remedy, the Indians could lose substantial elements of their own property without anything to deter the federal officials (who were directed to manage that property for the benefit of the Indians) from violating the governing directives, and without any compensation for that past loss. Though the 1934 Act did not itself say in express words that the Indian owners were to receive the financial benefits of sustained yield principles, that was its necessary meaning.[12] The property was Indian and Con-

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[11] In 1934, even the opportunity for seeking affirmative relief against federal officials was problematic. There was no general consent-to-suit comparable to 5 U.S.C. § 702 (1976), and the defense of sovereign immunity was often raised in litigation seeking injunctive or mandatory relief involving property of which the Government held bare legal title. *E.g. Naganab* v. *Hitchcock*, 202 U.S. 473, 475-76 (1906).

[12] It is very hard to believe that Congress, for example, would exclude Indians whose forests were wholly or largely wasted, because of federal officials' gross failures to follow the principles of sustained yield, from recovering compensation for that loss. There is no administrative channel for obtaining compensation, and prospective judicial relief by way of injunction or declaratory relief (to the extent it existed at all, *see* note 11, *supra*) would not avail for damage already done. An eminent domain suit for just compensation would probably be barred because of lack of Congressional authority to take the property by negligent or intentional waste. *See* note 13, *infra*. In *Menominee Tribe of Indians* v. *United States*, 117 Ct. Cl. 442, 91 F. Supp. 917 (1950), this court expressly held that violation of an earlier specific statute directing the

gress put it under the comprehensive fiduciary control of the Government; such direct and continuous management of Indian forest property by federal officials was no more purely "governmental" than management of Indian funds in the hands of the Government—a matter which has long been subject to suit for improper action, once there is a statute comparable to 28 U.S.C. §§ 1491 and 1505. *See* Part IV, *infra*.

3. *25 U.S.C. §§ 318a, 323-325 (roads and rights-of-way)*: This legislation provides for (a) appropriations for improvement, construction, maintenance, etc. of roads on Indian reservations (to be used under Interior regulations), § 318a and (b) grants of rights-of-way over Indian land with "payment of such compensation as the Secretary of the Interior shall determine to be just" (again under Interior regulations), 25 U.S.C. § 325. This legislation, too, clearly mandates compensation to the Indians for failing to obtain just payment for their loss of value because of federal failure to obtain adequate payment from grantees, to restore rights-of-way to original condition, and for improper deduction of the cost of maintaining roads. Of course, a suit may always be maintained to the extent a strict Fifth Amendment taking can be claimed. But *Coast Indian Community* v. *United States*, 213 Ct. Cl. 129, 550 F.2d 639 (1977), correctly allowed recovery for the improper grant of a right-of-way although the court could not

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equivalent of sustained yield for the Menominees rendered the United States liable for violation of that principle, even assuming that the later special act under which that suit was brought did not create liability but merely gave jurisdiction to this court, 117 Ct. Cl. at 499-501. In the present case, that jurisdiction is conferred by 28 U.S.C. §§ 1491, 1505.

find a constitutional taking.[18] The right-of-way statute expressly contemplates "just" pay to the Indian owners, without limiting suit to a Fifth Amendment taking. It cannot be that Congress intended no payment at all for rights-of-way incorrectly granted by Interior without proper authority. Moreover, when read *in pari materia* with the other forest control statutes (just discussed), these right-of-way provisions authorize compensation for loss of income or property value occasioned by Interior's unjustified failure or refusal to build or maintain the roads called for by proper harvesting and forest care.

4. *Summary*: The common thread of the statutes we have just construed as contemplating compensation to the Indians is that they all (a) deal with Indian-owned property, (b) directed to be managed and controlled by federal officials as fiduciaries, (c) in the express interest of and for the benefit of the Indians, and (d) from which Congress clearly wanted the Indians to obtain the financial benefits. In sum, this is a typical Indian trust relationship involving monetary benefits to the beneficiary. In those circumstances it cannot be said that the Congress was merely "regulating" Indian affairs, as it does many other facets of our national life; rather, Congress contemplated that the Indian property owners would receive income from their property while managed by the fiduciary Government, or the appropriate value of the property if it was transferred by the federal managers or if the managing federal officials im-

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[18] In *Coast Indian Community*, the alleged taking was done without the necessary legislative authority (the federal officials failed to follow the specific requirements Congress laid down) and accordingly a Fifth Amendment taking could not be found. That would appear to be a not uncommon happening.

properly lost or destroyed it or decreased its value. There is no difficulty in construing these particular pieces of legislation to mandate this kind of compensation (if the facts are proved) even under the strict standards called for by the Supreme Court. Congress itself, and not merely a governmental unit, has envisaged and mandated in these statutes the payment of this type of money.[14]

D. We hold, however, that plaintiffs are not entitled to sue for other types of damages or compensa-

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[14] In enacting 28 U.S.C. § 1505 in 1946 (first passed as section 24 of the Indian Claims Commission Act of 1946, ch. 959, § 24, 60 Stat. 1055) Congress seems to us to have affirmatively expected that post-1946 monetary legal claims for governmental breach of trust under past and future federal statutes would be brought by Indians in this court. Congressman Jackson, committee chairman and principal sponsor of the bill in the House of Representatives, said: "The Interior Department itself has suggested that it ought not to be in a position where its employees can mishandle funds and lands of a national trusteeship without complete accountability" and "let us see that the Indians have their fair day in court so that they can call the various Government agencies to account on the obligations that the Federal Government assumed." 92 CONG. REC. 5312 (1946). *See also*, H.R. REP. NO. 1466, 79th Cong., 2d Sess., *reprinted in* [1946] U.S. CODE & AD. NEWS 1347, 1351 (referring to the proposed act as opening this court to Indian cases where "fiduciary duties have been violated" and to the "victims of their maladministration"). Section 1505 did not itself create the underlying substantive right to monetary compensation, and may not have, by itself, waived sovereign immunity for suits under the legislation involved here, but it is noteworthy that the 1946 Congress which molded the § 1505 provision for suit in the Court of Claims apparently expected that violations of fiduciary duty could be redressed in an action here for monetary compensation.

tion: indirect or consequential business, economic, or personal damages due to the loss (total or partial) of their property, or personal, psychological, or social harm experienced by the Indian owners or the tribe as a consequence of federal mismanagement of their property. These are not clearly included in the legislation plaintiffs invoke; the statutes concern property and its rightful proceeds. The only compensation for which plaintiffs can sue in this court, under the legislation on which they rely, is direct loss or diminution in value of their property (and its proceeds) due to mismanagement by federal officers.

It should be added that the standard by which Interior's actions are to be judicially tested is, not the court's or plaintiffs' own view of the preferable conduct, but the normal standard for government fiduciaries—were their actions in good faith and within the realm of their acceptable discretion, or were they arbitrary, capricious, in abuse of discretion, or contrary to law? We repeat, too, the caution that all the rules governing the relationship between private fiduciaries and their beneficiaries do not necessarily apply in full vigor to Indian claims against the United States. "In each situation, the precise scope of the fiduciary obligation of the United States and any liability for breach of that obligation must be determined in light of the relationships between the Government" and the Indians. *Navajo Tribe* v. *United States, supra,* 224 Ct. Cl. at ——, 624 F.2d at 988.[15]

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[15] We intimate, of course, nothing on the merits of the claims under the proper standard. On the present motion, plaintiffs are entitled to the chance to prove their case. Whether they will do so or not, we do not know.

IV

This part of our opinion treats the various other nonconstitutional, noncontractual claims raised by plaintiffs. Several concern Indian funds in the hands of or controlled by the Federal Government. One contention is that the administrative fee-deductions authorized by Congress from proceeds payable to or for the Indians (25 U.S.C. §§ 406, 407) were excessive or improper in certain respects. There is undoubted consent-to-suit for such claims that the Government illegally kept some of the Indians' own money or property. *See United States* v. *Testan*, *supra*, 424 U.S. at 400, 401; *Eastport S.S. Corp.* v. *United States*, 178 Ct. Cl. 598, 605-06, 372 F.2d 1002, 1007-08 (1967).[16] The same is true of other illegal withdrawals from funds received from loggers for these Indians, as well as for misapplication of trust funds required by law to be paid to plaintiffs or applied to their benefit.

A somewhat different problem involves interest. Our decision in *Cheyenne-Arapaho Tribes of Indians* v. *United States*, 206 Ct. Cl. 340, 512 F.2d 1390 (1975), deals with interest on Indian funds for the period after the August 1946 closing-date of Indian Claims Commission claims. Briefly, tribal trust funds and proceeds of the sale of Indian lands must be held in the Treasury at interest under 25 U.S.C. §§ 161a and 161b (1976), but an alternative under § 162a is deposit in banks; this also applies to the funds held by the United States for individual Indians, 25 U.S.C. § 162a (1976). The bank deposits are subject to rigid

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[16] We pointed out the same principle in an unreversed part of our first *Mitchell* opinion, *supra*, 219 Ct. Cl. at ——, n.19, 591 F.2d at 1305, n.19.

statutory precautions to assure complete safety. The holding of *Cheyenne-Arapaho* is that defendant must as trustee exercise reasonable management zeal to get for the Indians the best rate, the statutory 4% being but a floor, not a ceiling. *United States* v. *Mescalero Apache Tribe*, 207 Ct. Cl. 369, 518 F.2d 1309 (1975), *cert. denied*, 425 U.S. 911 (1976), which defendant says overruled *Cheyenne-Arapaho*, did not do so; it involved different statutes and periods of time from those with which we were concerned in *Cheyenne-Arapaho* and are concerned with here.[17]

The proceeds actually paid to plaintiffs under the statutes construed in Part III, *supra*, obviously should include interest which should have been earned or allowed on those underlying proceeds. The payments made to the Indians are enhanced by previous investment proceeds just as they are reduced by administrative expenses properly chargeable. Plaintiffs are not entitled, however, to such interest on any unpaid amounts they may now recover in the present suit under Parts III and IV, *supra*. Those sums or their equivalent were never held by the Government for plaintiffs, were not subject to the specific interest provisions we have just discussed, and there is no statute awarding back-interest on such unpaid compensation now awarded by the court in this suit. 28 U.S.C. § 2516(a) (1976) allows "interest on a claim against the United States" in a judgment of this court "only under a contract or Act of Congress expressly providing for payment thereof." There is no more war-

[17] The controlling standards for determining breaches of the fiduciary obligations considered in this Part IV, are, of course, the same as the standards for federal fiduciaries discussed in Part III, D, *supra*. This is likewise true of the limits on recoverable compensation.

rant for including back-interest in a judgment on claims for unpaid compensation in this case than in the myriad of other non-constitutional suits (including Indian claims) in which we cannot award interest. *See, e.g., United States* v. *Alcea Band of Tillamooks*, 341 U.S. 48, 49 (1951).

Finally, on the non-constitutional claims, we deny entitlement to any recovery under 25 U.S.C. §§ 349, 377 (1976) (and their regulations), which deal with the issuance of fee patents to Indians found by Interior to be competent. Though the underlying land is held in a limited trust (*see United States* v. *Mitchell, supra*), this fee-patent legislation suggests little of the assumption of fiduciary responsibility,[18] and does not involve management of property by the Government itself; it is much closer to non-Indian licenses or permits like that involved in *Eastport S.S. Corp.* v. *United States, supra*, 178 Ct. Cl. 599, 372 F.2d 1002. The statutes seem almost purely regulatory, invoking Congress's plenary power over Indians, and do not themselves mandate any compensation to the plaintiffs for such alleged injuries as failing properly to determine whether or not an Indian was competent to obtain an allotment, or for issuing patents to incompetents despite the statute.

V

Defendant does not deny plaintiff's right to pursue constitutional claims for a taking under the Just Compensation clause, and it is beyond question that these can be brought in this court. *See, e.g., United States* v. *Mitchell, supra*, 445 U.S. at 540 n.2.

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[18] The purposes of the special trust provision of the General Allotment Act, as discussed by the Supreme Court in *Mitchell, supra*, 445 U.S. at 542-545, did not include a true fiduciary or guardianship relationship toward the Indian-owners.

Plaintiffs also, rather weakly, state their claims as founded on express or implied contracts. The powers of attorney from the owners to the Government do not contain any express commitments against mismanagement in exercising the powers. There are also timber sales contracts, but these are between the Indian owners (represented by the defendant's employees) and the lumber companies, and are not enforceable against the United States in the Court of Claims. *See United States* v. *Algoma Lumber Co.*, 305 U.S. 415 (1939).

It could be that the contractual obligations plaintiffs invoke are implied at law, but, if so, they are outside our province. If, however, plaintiffs can show any actual contracts to manage properly, by and between themselves and defendant—express or implied in fact—they may amend their petitions to allege such actual agreements, under the monitoring of the Trial Division according to our rules. Such new allegations should be at least specific enough to call for a trial on the existence of the contracts, or to be capable of being backed up by documentary or affidavit support on a motion for summary judgment.

VI

On the issues of excessive charges against payments collected for timber sales and failure to earn sufficient interest on Indian funds in Government hands, defendant now says that Helen Kirschling, formerly Helen Mitchell, has exhausted her administrative remedies but the other plaintiffs (close to 1500 in number) have not. This contention comes too late. Mrs. Kirschling's administrative appeal was filed long after suit was brought in January 1971, and related only to excessive charges, not interest. The Board

of Indian Appeals regarded the issue to be discretionary and referred the matter to the Assistant Secretary, who denied the appeal in the exercise of his discretionary authority. Defendant's original motion to dismiss did not address this exhaustion issue, nor did we in our earlier ruling. We conclude that no administrative appeal relating to these questions was prescribed as mandatory, and in any event defendant waived it by not earlier advancing the defense. Even if, however, exhaustion was a definite prerequisite to suit, one test appeal must be regarded as enough in these circumstances. The adverse secretarial decision in no way turned on any feature of Mrs. Kirschling's case which was not equally present in all the others. It would be a useless formality to require each of the multitude of claimants to go needlessly through the same course. The exhaustion doctrine was not devised in order to multiply futile paperwork only to achieve a preordained result.

Conclusion

Defendant's motion to dismiss is denied except as indicated in this opinion. These cases are returned to the Trial Division for further proceedings in accordance with this opinion.

NICHOLS, *Judge*, concurring and dissenting:

The following summary will show how far I would go in entertaining the claims now before us. I believe we have jurisdiction over claims for—

1. Improper deductions for proceeds of timber sales for administrative expenses.

2. Failure to invest tribal funds as allowed by law, to obtain the best available interest.

3. Taking claims, which are not subject to *Testan* analysis.

The *Testan* or strict construction analysis will not allow plaintiffs to prosecute in this court claims for—

1. "Mismanagement" and its pecuniary consequences, as *e.g.*, in failure to plan, failure to locate logging roads to minimize erosion, etc.

2. Breach of congressional requirements as by clear cutting where the law requires sustained yield.

3. Issuing fee patents to incompetent Indians, or money proceeds therefrom, resulting in dissipation of Indian assets.

I therefore respectfully differ with Parts II and III, but agree with and join in Parts IV, V, and VI. I agree with the court as to four out of six categories of claims.

The court agrees that the consent to suit cannot be implied but must be unequivocally expressed; however, it asserts that given the Tucker Act, a substantive obligation plus a strong and clear implication that money is to be paid for breach of the substantive obligation is enough. The substantive obligation here is to manage Indian timberland in an exemplary fashion. The strong and clear implication here is apparently in the mind of the judges only. No attempt is made to show an expression of it by Congress in the statutory language or in the legislative history. The reasoning is, in a nutshell, that in the statutes relied on, read together, Congress has created substantive duties for Interior Department officials

to carry out, functions to perform, that strikingly resemble those of a private trustee respecting trust property. It is universally held that a private trustee is personally liable for misperformance of his duties. Therefore, the symmetry of the law requires that the United States (not the erring officials) be liable also. This is the strong and clear implication.

This implication is in cold reality but a strong and clear wish on the judge's part. And I will say for myself, I share it. I hope to live so long as to see the day when the Congress will amend the Tucker Act to make it say: "this consent to be sued shall be liberally construed to effectuate the purpose of Congress, which is that (except where statutes expressly declare otherwise) the United States shall be liable for whatever wrongs a private body would be liable for in a comparable situation, and those for which the United States would have been held liable, but for absence of consent to suit." I cannot join in efforts to achieve this result by judicial fiat. I think it achieves no overall benefit to the injured claimants and in the end hurts this court, however much it may establish our credentials as persons of good will. It is counterproductive for lower court judges to try to enact the dynamic and positive role of the Supreme Court instead of the one the Supreme Court has assigned to them.

This court has repeatedly failed to take the doctrine of strict construction of the consent to be sued with sufficient seriousness, and apparently nothing can shake its obstinate adhesion to error, to which it repeatedly returns like an alcoholic to the bottle. Such judicial recidivism is peculiarly unfortunate in the case of Indian claims, where it makes the 1946 cutoff date under 25 U.S.C. § 70 and ff for the pros-

ecution of Indian moral claims appear to be of no practical importance. If a correct jurisdictional holding by us did not help in procuring the legislation above suggested, it perhaps could further a shift of the 1946 date to a later one, as it appears apparent that Indian real or alleged wrongs did not suddenly end in 1946, as the Congress fondly imagined they would or had.

We might, as a hypothetical, ardently wish that the United States should be liable under the Tucker Act for maladministration of bankrupt estates. We could point out that the duties of bankruptcy trustees are strikingly similar to those of equity receivers, private individuals who served under the supervision of state equity courts in the old days, and who undoubtedly were a category of trustees, personally liable for misfeasance respecting property in receivership. We could be perfectly consistent with today's holding, in entertaining a Tucker Act suit based on a bankruptcy trustee's misfeasance, but of course we will not, because we do not ardently desire to take jurisdiction in the bankruptcy field, and therefore we would perceive no strong and clear implication.

There follows, Part I, some general comments on the scope of the strict construction doctrine. Part II, the correct technique of applying it to the case at hand, and Part III how I would deal with specific classes of claims.

I

Our problem is to determine which, if any, of the various clauses of plaintiffs' claims fall within the defendant's waiver of sovereign immunity and consent to be sued. Consent must be granted by Congress and "cannot be implied but must be unequivocally expressed" as the Supreme Court again re-

minds us in its *Mitchell* decision, 445 U.S. 535, 538 (1980), quoting *United States* v. *King*, 395 U.S. 1, 4 (1969). The task has historically been difficult for Court of Claims judges, and their District and Circuit judge counterparts sitting as courts of claims under 28 U.S.C. § 1346. None of us have always been right. Even those well informed as to the above limitations are likely to imagine existing statutory consents to be broader than they really are. Skilled members of the bar are frequently taken aback by limitations on the jurisdiction of this court previously unsuspected by them. Members of the lay public often petition here in the belief we are some kind of ombudsman, and are amazed to be opposed by able government counsel urging technical jurisdictional objections. These expectations derive from oversweeping rhetoric, as, *e.g.*, the quotation from President Lincoln that decorates our lobby, "[i]t is as much the duty of Government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private citizens." CONG. GLOBE, 37th Cong. 2d Sess. app. at 2 (1862), the statement that we are "the conscience of the Nation" and even, one is tempted to add, Justice (formerly Mr. Justice) Holmes in *United States* v. *Emery*, 237 U.S. 28, (1915)—

> [It is an] inadmissible premise that the great act of justice embodied in the jurisdiction of the Court of Claims is to be construed strictly and read with an adverse eye. * * *

Though such notions have never been fully adopted by Congress or the courts, they permeate imperceptibly into the minds of Court of Claims judges with the result that reversals of this court on jurisdictional issues by the Supreme Court almost always turn on

error in that this court construed its own statutory jurisdiction too broadly. *Amell* v. *United States*, 384 U.S. 158 (1966) is an example of the opposite, but it stands virtually alone. As a broad rule of thumb it might be stated that if we judges of the Court of Claims have doubts about our own jurisdiction, the correct answer probably will be that we have none. That the construction of statutory consents to suit must be strict is also a safe generalization. Some examples of strict construction follow, touched on briefly as they lie on the periphery of our argument.

The original 1887 Tucker Act consented to suits in this court on certain stated classes of claims—

> * * * [I]n respect of which claims the party would be entitled to redress against the United States either in a court of law, equity, or admiralty if the United States were suable. [24 Stat. 505]

In *United States* v. *Jones*, 131 U.S. 1 (1889), the Court held that this language did not consent to a bill in equity for specific performance of a contract to sell land. The Court limited the "equity" reference to claims for money arising out of equitable demands. At that time, as the Court pointed out, managing the public lands was a "political" function in which the interference of the judiciary seemed unthinkable. Consent to suits for money seemed more natural and more in accord with the enlightened expectations of jurists. Now, however, equitable relief against the government is more acceptable than money judgments. Consent to suits for injunctive and declaratory relief against the government is virtually unlimited, 5 U.S.C. § 702, while consent to suits for money are still stringently limited. However, the exclusion of equitable relief from the jurisdiction of this

court still stands unchanged. *United States* v. *King*, *supra*. The *Jones* case is on the periphery of the argument here because, as we stated in *Mitchell I*, plaintiffs herein invoked trust doctrines developed on the equity side of the courts before the merger of law and equity, but did not run counter to *Jones* because they did not claim other than money damages.

In *Hopkins* v. *United States*, 206 Ct.Cl. 303, 513 F.2d 1360 (1975), the plaintiff, a discharged employee of a nonappropriated fund agency, sued under the Tucker Act amendment that extended its coverage to an "express or implied contract" of such agencies, not previously covered. 84 Stat. 449. Defendant urged that plaintiff's relationship as an employee was, under the normal federal rule, not contractual. The legislative history showed that the amendment was intended to correct the result of cases denying relief, one of which had been a suit by a discharged employee. In other than a consent to suit context, it might well have been held that Congress could effect its intent even using technically incorrect language, if the intent was nevertheless manifest. However, faced with the strict construction canon, this court attempted to effectuate the intent of Congress with a somewhat laborious showing that employment in a nonappropriated fund agency was under an implied contract. The Supreme Court, however, 427 U.S. 123 (1976), held that employees of such agencies could invoke the amendment only on the basis of evidence that their employment was in fact contractual, and in the absence of such evidence in the record, remanded for further proceedings on that question. Thus it seems clear that the congressional effort to better the position of employees of nonappropriated fund agencies, if the amendment was indeed so intended, misfired because of incorrect use

of technical language, and as a practical matter, employees of such agencies do not now sue in this court frequently, if at all.

It also appears that the possibility of a repeal by implication is viewed more favorably in consent to sue context. The demise of this court's admiralty jurisdiction is a striking example of that. The Tucker Act language already quoted granted admiralty as well as equity jurisdiction, and up to 1932 this court routinely exercised it in cases sounding in contract, *e.g.*, *Alaska Exploration Co.* v. *United States*, 44 Ct.Cl. 392 (1909); *Bull Insular S.S. Co.* v *United States*, 62 Ct.Cl. 338 (1926). However, in *Matson Navigation Co.* v. *United States*, 284 U.S. 352 (1932), in affirming a decision here on different grounds, 72 Ct.Cl. 21 (1931), the Supreme Court held that the 1920 Suits in Admiralty Act, 41 Stat. 525, which consented to admiralty suits against the United States in the district courts, repealed the Tucker Act *pro tanto*. The 1920 Act did repeal all acts and parts of acts in conflict therewith. That is its only reference to the Tucker Act. In other than a consent to suit context, it would not be thought one statute was in conflict with another solely because they provided different avenues for the litigant to follow in seeking to right the same wrong. The *Matson* decision was in effect ratified by Congress and it is not intended to suggest that, absent further legislation, an admiralty claim could be pursued here under the Tucker Act today.

As to partial repeals by implication of consents to suit, *see also Brown* v. *GSA*, 425 U.S. 820 (1976), we have recognized the occurrence of such partial repeals in *Whitecliff, Inc.* v. *United States*, 210 Ct.Cl. 53, 536 F.2d 347 (1976), *cert. denied*, 430 U.S. 969 (1977), and in *Fiorentino* v. *United States*, 221 Ct.Cl.

545, 607 F.2d 963 (1979), *cert. denied*, 444 U.S. 1083 (1980).

The doctrine of strict construction is subject to some abatement when it is perceivable that rigorous application of it would deny a constitutional right. *Russian Volunteer Fleet* v. *United States*, 282 U.S. 481, 491 (1931). *See Califano* v. *Sanders*, 430 U.S. 99, 109 (1977). But the doctrine of strict construction is not one of those that receive mere lip service. It will not go away, it does mean business, and it does mean us. Our decision, *Mitchell I*, is somewhat tainted by the fallacy that plaintiffs must be entitled to recover because they have no other remedy. So far as the claims are constitutional, this is a factor, otherwise, it is not. As said in *United States* v. *Testan*, 424 U.S. 392, 403 (1976), being without a remedy in the Court of Claims is not the same thing as being without a remedy *simpliciter*. Defendant points out the plaintiffs had the benefit of the unrestricted consent to injunctive and declaratory adjudications in 5 U.S.C. § 702. As to tribal claimants, the historic policy of Congress, uniformly adhered to up to 1946, was itself to deal directly with tribal claims and refer only selected ones to the courts under ground rules for adjudication expressly spelled out for the case. As regards individuals, consents are broader and have existed longer, but there can be no pretense that the government can be sued in every class of case where a private corporation could be sued, Mr. Lincoln's stated ideal.

II

We turn now to the technique for applying the doctrine of strict construction to the class of case here involved. The Supreme Court in its *Mitchell* refers

us to what it considers the leading opinion on this, *United States* v. *Testan, supra.* The provision of the General Allotment Act that we had relied on stated that the involved allottees' lands were to be held in trust for "the sole use and benefit of the Indian to whom the allotment is made." The reliance was held mistaken because as a matter of substantive law the quoted words did not impose on the United States the obligation to manage the allotments. Reference to the legislative history showed the purposes were to prevent alienation and shield against state taxation, purposes not inconsistent with the Indians managing the timber harvest themselves. The Court wanted us to reexamine the entire complex of law relied on by the Indians, to see whether the necessary substantive law and consent to suit can be spelled out from them.

The Court, in *Testan*, puts aside the cases of contract litigation, illegal retention or withholding of money (including tax cases), and fifth amendment takings. There may be other instances where the *Testan* analysis does not apply. I do not think the list of exclusions was meant to be complete. Except for the exclusions, which whatever they are, obviously do not include either the *Testan* or the *Mitchell* claims themselves, the analysis appears to demand three elements in a valid consent to be sued, as follows:

> The claimant must show statutes creating or recognizing—
>
> (a) a substantive right;
>
> (b) to recover money damages;
>
> (c) within the jurisdictional coverage of the Tucker Act.

Claimants in *Testan* wanted their federal positions reclassified upward and the Court conceded, as did defendant, that they had a substantive right to proper job classification though enforceable otherwise than by money damages in the Court of Claims. The error of this Court was in mistaking this substantive right for a congressional mandate to effectuate its enforcement in back pay. What was missing was element (b), an unequivocal expression by Congress that the misclassification, when found, was to be rectified by back pay in the form of damages. This serves to differentiate the *Testan* case from *Mitchell*, where a careful reading of Justice Marshall indicates that element (a), the substantive right, was the one missing.

The *Testan* analysis purports to derive from, and cites with approval, our case, *Eastport Steamship Corp.* v. *United States*, 178 Ct.Cl. 599, 372 F.2d 1002 (1967), in which, however, this sharp distinction between substantive right and authority to award damages for its violation is not drawn. In *Eastport* we said, 178 Ct.Cl. at 606, 372 F.2d at 1008 "some specific provision of law [that] embodies a command to the United States to pay the plaintiff some money, upon proof of conditions which he is said to meet," is what is required in the category of cases not involving illegal exaction. This could allow the claimant to refer to a specific provision of law which, however, only authorizes payment of money by implication, and further down the page we say the right to money may be granted "in terms or by implication," citing authority. This latter gloss cannot be said to be approved in *Testan*. Applying retroactively a *Testan* analysis to the *Eastport* claim, it appears that claim was for pecuniary injury resulting from unexcused delay in issuance of a license. Our opinion points out

how common injury of that kind must be, and how remarkable, if it were compensable, there were not court decisions and statutory provisions dealing with the problem. Actually, the claim seems to be for misgovernment, *i.e.*, for misfeasance in the exercise of peculiarly governmental functions, as to which Mr. Lincoln never advocated liability, for it involves issues that could not arise between private litigants. Recently we denied a similar claim on the treble grounds it was for misgovernment, it was barred by the "sovereign act" doctrine, and it was not consented to under the *Eastport* analysis. *City of Manassas Park* v. *United States*, 224 Ct.Cl. ——, 633 F.2d 181, *cert. denied*, 449 U.S. —— (1980). Thus it appears the *Eastport* decision is no longer a safe guide to the strict construction doctrine unless regard is had to the refinement upon it introduced in *Testan*. And the refinement, obviously, is a new stress on specificity in element (b), that what is required, outside the Tucker Act, is a statutory statement that, for the breach of right involved, the claimant be authorized to recover "money damages." In *Eastport* the claim being deficient in element (a), substance, the degree of specificity required for element (b) was not addressed except in dictum. In *Testan* the substantive right was conceded and thus element (b) became decisive for application of strict construction. The "substantive right" is no longer enough. I would not deny the possibility of element (b) being satisfied by a strong implication, but I think the implication should be in the mind of Congress, not the court's alone.

Defendant, however, went much too far, implicitly in its briefs, and expressly in oral argument, in demanding almost complete tautology between the

Tucker Act and the other legislation examined in strict construction analysis. The Supreme Court assuredly never intended to say that the other legislation, the source of the substantive right, must duplicate the Tucker Act in specifying that a lawsuit is consented to, still less in what tribunal. The best evidence of that is that *Testan* cites with approval, as a properly consented suit, *Selman* v. *United States*, 204 Ct.Cl. 675, 498 F.2d 1354 (1974), when the other legislation referred to consisted of the provision of 37 U.S.C. § 202(l) to the effect that an officer in plaintiff's category is entitled "to the basic pay of a rear admiral (lower half) or brigadier general, as appropriate." This is all the Supreme Court refers to or our opinion below, and the Back Pay Act, 5 U.S.C. § 5596, does not apply to military pay. *Sanders* v. *United States*, 219 Ct.Cl. 285, 594 F.2d 804 (1979). In *Sanders* defendant initially had relied on *Testan* but conceded its jurisdictional constraints were satisfied when plaintiff's claim for judicial promotion was removed from the case. It is, of course, clear that before or after *Testan*, a military pay case in this court must not claim the pay of a position never held. Nonpromotion to or nonselection for a position never held normally is, if wrongful, misgovernment only. *Rawlins* v. *United States*, 225 Ct.Cl. ——, 646 F.2d 459 (1980) is not contrary to this because it construes a special jurisdictional act, Private Law No. 95-60. It is time for defendant to cease and desist from urging *Testan* as a bar to military and other pay cases claiming pay for positions actually held. The Supreme Court obviously never intended to withdraw jurisdiction over a class of case where legislation other than the Tucker Act can be said, in *Eastport* terminology, to "mandate compensation" in money. The references in *Testan*, therefore, to

"money damages" in connection with rights created outside the Tucker Act does not mean the other legislation must speak in terms of a lawsuit. It is a shorthand way of saying the other legislation must mandate the payment of money in terms readily expressible as money damages in case the mandated duty is not performed.

Where the statute, 25 U.S.C. §§ 406, 407, and regulations, authorize defendant to sell timber from allotted land held by it in trust, receive the proceeds and pay them over to the beneficial owners or dispose of proceeds for owners' benefit, subject to charge for administrative expenses, this in my view mandates the payment of money and, with the Tucker Act, by a *Testan* analysis consents to a suit by an owner for proceeds not paid over to him or properly subtracted for administrative expenses. The amount recoverable on this theory would be limited by *Testan* analysis to the gross amount of proceeds received less proper credits and would not include consequential damages. Defendant in its July 28, 1980, brief at 52 recognizes the clear difference between claims of this character and those in the category of "mismanagement" and will not be astonished by the distinction I draw. I do not agree with defendant, however, that claims as stated above are only in *Eastport* category 1 as illegal exactions. They belong in the other *Eastport* category as the funds were not illegally exacted but were rightly collected. However, I will not be technical: funds of this nature may belong in both categories.

Mason v. *United States*, 198 Ct.Cl. 599, 461 F.2d 1364 (1972), *rev'd*, 412 U.S. 391 (1973), stands as a precedent as regards assent to suits to recover for misapplication of trust funds required by law to be

paid to Indians or applied for their benefit. The misapplication there was in using trust funds to pay taxes we believed not due. The reversal was on grounds not here involved. *Testan* was still in the future. However, by *Testan* analysis the defendant was substantively a trustee of funds in its hands, and was specifically required to pay them over sooner or later to the Indians, less proper deductions, which, by *Testan* analysis, is with the Tucker Act unequivocal assent to the suit. The defendant did not contest jurisdiction on the grounds that subsequently prevailed in *Testan* and it would appear, properly did not. The statement, however, that the government is liable by implication of the Osage Allotment Act to pay compensation for any breach of trust to the pecuniary disadvantage of a noncompetent Osage allottee (198 Ct.Cl. at 617, 461 F.2d at 1374) is too broad and is contrary to the rule that assent to suit "cannot be implied but must be unequivocally expressed." *United States* v. *King*, 395 U.S. 1, 4 (1969), as construed in *Testan* and *Mitchell*.

Claims by Indian allottees for excessive charges against timber revenues for administration survive *Testan* analysis and there may be others.

In this case we also may have jurisdiction of fifth amendment taking claims where defendant has made use of portions of allotments for roads, or prevented harvesting of some portions to furnish screens for camp sites, etc. The court points out correctly the defenses that may prevail, that the taking was unauthorized, but this does not affect jurisdiction *per se*.

III

Plaintiffs refer us to statutes other than the General Allotment Act, *supra*, 25 U.S.C. §§ 406 and 407, *as amended*, which authorize owners to sell timber

with consent of the Secretary of the Interior. In effect, defendant sells pursuant to powers of attorney obtained from allottees. The proceeds are paid the owners. Timber is to be sold according to the principle of sustained yield, under regulations the Secretary is to prescribe. Regulations have existed since 1911 and they tell how sales are to be effected in great detail. The Bureau of Indian Affairs (BIA) supervises everything. Plaintiffs say the BIA failed to collect sufficient revenues from loggers, and allowed clear cutting of large, contiguous areas, instead of sustained yield. Clear cutting is somewhat the opposite of sustained yield. The BIA failed to make adequate provision for new growth or to regulate cutting for continuous production, failed to make comprehensive long range plans, failed to locate logging roads to minimize erosion, and failed to provide a sawmill on the reservation so the Indians could receive profits and wages therefrom.

Under 25 U.S.C. §§ 349, 372, defendant was authorized to issue fee patents to Indians whom it found fit to manage their own affairs. But some patents were issued to Indians incompetent to manage their own affairs. Other fee patents were issued without adequate provision to protect access to remaining "landlocked" allotments.

Under 25 U.S.C. §§ 318a and 323-325, defendant was to grant rights of way across trust lands, with consent of the involved Indians and payment of compensation. Defendant failed to obtain fair market value for rights of way, failed to obtain proper consent of Indian landowners, improperly deducted road maintenance costs from "stumpage" payments to Indians, and failed to require restoration of some rights of way to original condition.

Some of the alleged mismanagement under this head may be stated as a taking claim and is covered by comment *supra*.

Under 25 U.S.C. § 162a the Secretary was to invest tribal funds and obtain the best income available. This plaintiffs say was not done.

I concede that plaintiffs have met the first *Testan* requirement. Though apart from the General Allotment Act they have not pointed to any statute that speaks in terms of trusteeships, they have alleged the existence of legal duties owed to them and breach of such duties by defendant, as a matter of substantive law. It is obvious, however, that such allegations do not meet the second test, because they do not unequivocally allege an obligation to pay money, as a semantically separate and analytically independent proposition. It does not advance us any towards a conclusion that defendant has consented to be sued for money damages for the kinds of malfeasance and misfeasance alleged, to say defendant is a trustee, unless we also allege that the sanctions created by law against an ordinary, *e.g.*, a testamentary trustee, are implied as a matter of law against defendant. But a sanction only implied by law is not "unequivocally expressed." Actually there is kind of a bootstrap quality of reasoning in saying that defendant's duties expressed by law are those of a trustee, and, therefore, we may look at SCOTT ON TRUSTS or the RESTATEMENT OF TRUSTS and impose on defendant all the other consequences the law, as stated by those authorities, derives from the status of an erring nongovernmental trustee. Therefore, my conclusions do not address, and I do not consider, whether defendant is a trustee as to any or all of the legal duties involved, despite the absence of legislation saying so.

Defendant in managing the property of its Indian wards was held to be exercising high governmental powers immune from judicial interference at least as long as it "purported" to act fairly. *Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1903). This we transmuted into a "good faith effort" test in *Three Affiliated Tribes of the Fort Berthold Reservation* v. *United States*, 182 Ct.Cl. 543, 390 F.2d 686 (1968), but still the test was satisfied though the shrinkage of the Indian property was considerable. That case came under the favorable observation of the Supreme Court in *United States* v. *Sioux Nation of Indians*, 448 U.S. 371 (1980). The *Three Affiliated Tribes* were paid for homestead lands without interest under the sections of the Indian Claims Commission Act, 25 U.S.C. § 70 and ff, which enforce moral claims, which sections do not apply here, as the Supreme Court notes in *Mitchell, supra.* The federal power over Indian lands is so different in nature and origin from that of a private trustee and the necessity of an Indian Claims Commission Act was so well recognized where mismanagement of trust land occurred, that caution is taught in using the mere label of a trust plus a reading of SCOTT ON TRUSTS to impose liability on claims where assent is not unequivocally expressed. And it is certainly at least arguable that mismanagement of Indian lands is really more assimilable to misgovernment, by a *Lone Wolf* analysis, than it is to the misfeasance of a testamentary trustee.

This court so repeatedly cites the recent Supreme Court case of *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136 (1980), as to give the impression, quite wrongly, that somehow the case supports the court's conclusions. It does, to be sure, consider and describe the scheme we must deal with

here, of government control of the harvesting and sale of Indian-owned timber. But the dispute dealt with was entirely different. It was whether the State of Arizona can license and tax a motor carrier engaged wholly in activities on the Reservation using Indian or United States Government-owned roads in logging, or hauling harvested logs. Held, the government regulatory scheme is so pervasive as to shoulder away the state, which performs no pertinent service. Certainly no private trustee could preclude state taxation in this manner and the holding thus appears to be that the federal role is different from that of a private trustee in kind as well as degree. *Lone Wolf* v. *Hitchcock* and its progeny are not cited or referred to but the opinion seems to be in the same tradition. This pervasive control over Indian life is such a high attribute of the federal sovereignty that ordinary law is precluded or lessened in its impact.

This court has already unanimously held that the trust label cannot be used as a substitute for unequivocal assent to suit when the alleged breach of trust was committed by Congress itself. *Menominee Tribe of Indians* v. *United States*, 221 Ct.Cl. 506, 607 F.2d 1335 (1979), *cert. denied*, 445 U.S. 950 (1980). When that case was decided, the precedents in this court still stood, that breaches of trust by executive branch officials were assented to *per se* as a subject of money claims. Now that we are required by remand to reexamine them, it is impossible to overlook language in the *Menominee* decision that would have indicated caution in the other cases if it had been decided before them. Certainly the absence of unequivocal assent to be sued, noted in *Menominee*, is a feature *Mitchell* shares as to the mismanagement claims. In our attack on the consent problem in *Menominee*, we proceeded "first of all" to say—

> * * * On the premise issue [consent to suit] now presented, we have nothing at all express in the statutes but only some general and ordinary words which can possibly be stretched to cover the claim, but need not necessarily be so understood. * * * [221 Ct.Cl. at 517, 607 F.2d at 1342.]

This is *Testan* analysis and *Testan* itself is cited for it. The contrast is then drawn with the Indian Claims Commission Act when the consent was so much more wide-ranging, liberal, and explicit in the words it used. It is not intended to suggest, however, that the other distinctions urged between that case and our *Mitchell* and *Duncan* v. *United States*, 220 Ct.Cl. 1, 597 F.2d 1337 (1979), *vacated and remanded*, 446 U.S. 903 (1980) decisions, then standing as valid precedents, were not valid when made.

Accordingly, I would hold that the mere application of a trust label to certain governmental functions respecting Indians, whether applied expressly by Congress or by judicial wish-fulfillment inference from the statutory imposition of trustee-like duties on the executive branch, does not constitute unequivocal assent to suits against the government for money damages when these duties are badly performed. It does not bring into play all that SCOTT ON TRUSTS thunders against an erring testamentary trustee. Something more is required, such as the expressed duty to pay over money as stated in Part II of this concurrence and dissent.

APPENDIX B

STATUTES INVOLVED

The Act of June 25, 1910, ch. 431, Section 8, 36 Stat. 857, as amended by Pub. L. No. 88-301, 78 Stat. 187, 25 U.S.C. 406, provides:

> Sale of timber on lands held under trust—Deductions for administrative expenses; standards guiding sales
>
> (a) The timber on any Indian land held under a trust or other patent containing restrictions on alienations may be sold by the owner or owners with the consent of the Secretary of the Interior, and the proceeds from such sales, after deductions for administrative expenses to the extent permissible under section 413 of this title shall be paid to the owner or owners or disposed of for their benefit under regulations to be prescribed by the Secretary of the Interior. It is the intention of Congress that a deduction for administrative expenses may be made in any case unless the deduction would violate a treaty obligation or amount to a taking of private property for public use without just compensation in violation of the fifth amendment to the Constitution. Sales of timber under this subsection shall be based upon a consideration of the needs and best interests of the Indian owner and his heirs. The Secretary shall take into consideration, among other things, (1) the state of growth of the timber and the need for maintaining the productive capacity of the land for the benefit of the owner and his heirs, (2) the highest and best use of the land, including the advisability and practicality of devoting it to other uses for the

benefit of the owner and his heirs, and (3) the present and future financial needs of the owner and his heirs.

Undivided interests

(b) Upon the request of the owners of a majority Indian interest in land in which any undivided interest is held under a trust or other patent containing restrictions on alienations, the Secretary of the Interior is authorized to sell all undivided Indian trust or restricted interests in any part of the timber on such land.

Unrestricted interests

(c) Upon the request of the owner of an undivided but unrestricted interest in land in which there are trust or restricted Indian interests, the Secretary of the Interior is authorized to include such unrestricted interest in a sale of the trust or restricted Indian interests in timber sold pursuant to this section, and to perform any functions required of him by the contract of sale for both the restricted and unrestricted interests, including the collection and disbursement of payments for timber and the deduction from such payments of sums in lieu of administrative expenses.

Representation of minors and others

(d) For the purposes of this Act, the Secretary of the Interior is authorized to represent any Indian owner (1) who is a minor, (2) who has been adjudicated non compos mentis, (3) whose ownership interest in a decedent's estate has not been determined, or (4) who cannot be

located by the Secretary after a reasonable and diligent search and the giving of notice by publication.

Emergency sales

(e) The timber on any Indian land held under a trust or other patent containing restrictions on alienations may be sold by the Secretary of the Interior without the consent of the owners when in his judgment such action is necessary to prevent loss of values resulting from fire, insects disease, windthrow, or other natural catastrophes.

Change in status without affecting contractual obligations

(f) A change from a trust or restricted status to an unrestricted status of any interest in timber that has been sold pursuant to this section shall not affect the obligations of the Secretary of the Interior under any contract of sale that is in effect at the time such change in status occurs.

The Act of June 25, 1910, ch. 431, Section 7, 36 Stat. 857, as amended by Pub. L. No. 88-301, 78 Stat. 186, 25 U.S.C. 407, provides:

Sale of timber on unallotted lands

The timber on unallotted lands of any Indian reservation may be sold in accordance with the principles of sustained yield, or in order to convert the land to a more desirable use, under regulations to be prescribed by the Secretary of the Interior, and the proceeds from such sales, after deductions for administrative expenses pursuant to section 413 of this title, shall be used for the benefit of the Indians who are members

of the tribe or tribes concerned in such manner as he may direct.

The Indian Reorganization Act of 1934, ch. 576, Section 6, 48 Stat. 986, 25 U.S.C. 466, provides:

Indian forestry units; rules and regulations

The Secretary of the Interior is directed to make rules and regulations for the operation and management of Indian forestry units on the principle of sustained-yield management, to restrict the number of livestock grazed on Indian range units to be estimated carrying capacity of such ranges, and to promulgate such other rules and regulations as may be necessary to protect the range from deterioration, to prevent soil erosion, to assure full utilization of the range, and like purposes.

The Act of May 26, 1928, ch. 756, 45 Stat. 750, 25 U.S.C. 318a, provides:

Roads on Indian reservations; appropriation

Appropriations are hereby authorized out of any money in the Treasury not otherwise appropriated for material, equipment, supervision and engineering, and the employment of Indian labor in survey, improvement, construction, and maintenance of Indian reservation roads not eligible to Government aid under the Federal Highway Act and for which no other appropriation is available, under such rules and regulations as may be prescribed by the Secretary of the Interior.

The Act of February 5, 1948, ch. 45, Section 1, 62 Stat. 17, 25 U.S.C. 323, provides:

Rights-of-way for all purposes
across any Indian lands

The Secretary of the Interior be, and he is empowered to grant rights-of-way for all purposes, subject to such conditions as he may prescribe, over and across any lands now or hereafter held in trust by the United States or individual Indians or Indian tribes, communities, bands or nations, or any lands now or hereafter owned, subject to restrictions against alienation, by individual Indians or Indian tribes, communities, bands or nations, including the lands belonging to the Pueblo Indians in New Mexico, and any other lands heretofore or hereafter acquired or set aside for the use and benefit of the Indians.

The Act of February 5, 1948, ch. 45, Section 2, 62 Stat. 18, 25 U.S.C. 324, provides:

Consent of certain tribes;
consent of individual Indians

No grant of a right-of-way over and across any lands belonging to a tribe organized under sections 461-473 and 474-479, of this title; sections 396 and 473a of this title and sections 358a and 362 of Title 48; and subchapter VIII of chapter 14 of this title, shall be made without the consent of the proper tribal officials. Rights-of-way over and across lands of individual Indians may be granted without the consent of the individual Indian owners if (1) the land is owned by more than one person, and the owners or owner of a majority of the interests therein consent to the grant; (2) the whereabouts of the owner of the land or an interest therein are unknown, and the owners

or owner of any interest therein whose whereabouts are known, or a majority thereof, consent to the grant; (3) the heirs or devisees of a deceased owner of the land or an interest therein have not been determined, and the Secretary of the Interior finds that the grant will cause no substantial injury to the land or any owner thereof; or (4) the owners of interests in the land are so numerous that the Secretary finds it would be impracticable to obtain their consent, and also finds that the grant will cause no substantial injury to the land or any owner thereof.

The Act of February 5, 1948, ch. 45, Section 3, 62 Stat. 18, 25 U.S.C. 325, provides:

Payment and disposition of compensation

No grant of a right-of-way shall be made without the payment of such compensation as the Secretary of the Interior shall determine to be just. The compensation received on behalf of the Indian owners shall be disposed of under rules and regulations to be prescribed by the Secretary of the Interior.

The Act of June 24, 1938, ch. 648, Section 1, 52 Stat. 1037, 25 U.S.C. 162a, provides:

Deposit of tribal funds in banks; bond or collateral security; investments

The Secretary of the Interior is hereby authorized in his discretion, and under such rules and regulations as he may prescribe, to withdraw from the United States Treasury and to deposit in banks to be selected by him the common or community funds of any Indian tribe which are, or may hereafter be, held in trust by the United

States and on which the United States is not obligated by law to pay interest at higher rates that can be procured from banks. The said Secretary is also authorized, under such rules and regulations as he may prescribe, to deposit in banks to be selected by him the funds held in trust by the United States for the benefit of individual Indians: *Provided*, That no individual Indian money shall be deposited in any bank until the bank shall have agreed to pay interest thereon at a reasonable rate, subject, however, to the regulations of the Board of Governors of the Federal Reserve System in the case of member banks, and of the Board of Directors of the Federal Deposit Insurance Corporation in the cases of insured nonmember banks, except that the payment of interest may be waived in the discretion of the Secretary of the Interior on any deposit which is payable on demand: *Provided further*, That no tribal or individual Indian money shall be deposited in any bank until the bank shall have furnished an acceptable bond or pledged collateral security therefor in the form of any public-debt obligations of the United States and any bonds, notes, or other obligations which are unconditionally guaranteed as to both interest and principal by the United States, except that no such bond or collateral shall be required to be furnished by any such bank which is entitled to the benefits of section 12B of The Federal Reserve Act, with respect to any deposits of such tribal or individual funds to the extent that such deposits are insured under such section: *Provided, however*, That nothing contained in this section or in section 264 of Title 12B of the Federal Reserve Act, shall operate to de-

prive any Indian having unrestricted funds on deposit in any such bank of the full protection afforded by section 12B of the Federal Reserve Act, irrespective of any interest such Indian may have in any restricted Indian funds on deposit in the same bank to the credit of a disbursing agent of the United States. For the purpose of this section and said Act, said unrestricted funds shall constitute a separate and distinct basis for an insurance claim: *Provided further*, That the Secretary of the Interior, if he deems it advisable and for the best interest of the Indians, may invest the trust funds of any tribe or individual Indian in any public-debt obligations of the United States and in any bonds, notes, or other obligations which are unconditionally guaranteed as to both interest and principal by the United States: *And provided further*, That the foregoing shall apply to the funds of the Osage Tribe of Indians, and the individual members thereof, only with respect to the deposit of such funds in banks.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1992 368241 827

Opposition

Office - Supreme Court, U.S.
FILED
MAY 5 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1748

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA,
Petitioner,

v.

HELEN MITCHELL, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Claims

---

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the decision below—that the beneficial Indian owners of trust lands on the Quinault Indian Reservation may sue the United States for money damages under 28 U.S.C. §§ 1491 and 1505 when the United States causes loss to the Indians' trust property by mismanagement which violates specific statutory duties—is consistent with the decisions of this Court in *United States v. Testan*, 424 U.S. 392 (1976), and *United States v. Mitchell*, 445 U.S. 535 (1980).

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IN THE

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HELEN MITCHELL, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Claims

---

RESPONDENTS' BRIEF IN OPPOSITION

The respondents, Helen Mitchell, other individual Indians owning allotments on the Quinault Indian Reservation, and the Quinault Indian Tribe, respectfully urge this Court to deny the Petition for a Writ of Certiorari by which the United States seeks review of the decision of the Court of Claims in this case, reported at 664 F.2d 265.

STATEMENT OF THE CASE

This case involves the claims of the Quinault Indian Tribe and some 1,465 individual Indians for monetary losses incurred by them as the result of the mismanagement of their trust property by their trustee, the federal government. Respondents claim that the Government's

mismanagement caused monetary loss to them by reason of uncompensated reduction in value of their property (waste) or transfer of some of that property to third parties without full consideration.

Respondents contend, and the Court of Claims has held, (i) that 25 U.S.C. §§ 406-407, 466 (and regulations promulgated pursuant thereto), 318a, 323-325 and 162a impose specific fiduciary duties upon the United States in connection with the management and sale of Indian land, timber and funds held in trust by the United States; (ii) that those statutes and regulations mandate compensation for damages sustained as a result of the Government's breach of those duties; and (iii) that, under 28 U.S.C. §§ 1491 (the Tucker Act) and 1505 (the "Indian Tucker Act"), the Court of Claims has jurisdiction to adjudicate such claims.

By its Petition for a Writ of Certiorari, the United States, while acknowledging that it undertook specific fiduciary duties with respect to the subject trust property, argues nonetheless that the Court of Claims lacks jurisdiction to entertain those claims, on the ground that the United States has not consented to be sued for the losses it caused to the respondents' property.

The principles which govern the instant controversy are neither complex nor novel; this Court stated them in *Testan* as follows:

> Where the United States is the defendant and the plaintiff is not suing for money improperly exacted or retained, the basis of the federal claim—whether it be the Constitution, a statute, or a regulation—does not create a cause of action for money damages unless, as the Court of Claims has stated, that basis "in itself . . . can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *Eastport S.S. Corp. v. United States*, 178 Ct. Cl., at 607, 372 F.2d, at 1008, 1009.

United States v. Testan, 424 U.S. 392, 401-02 (1976). Some of respondents' claims—those which seek redress for the Government's failure to pay interest on certain funds, for its underpayment of interest on certain other funds, and for its exaction of excessive administrative fees (*see* Petition, at 5)—*are* claims "for money improperly exacted or retained" and, thus, are clearly within the jurisdiction of the Court of Claims. *See, e.g., United States v. Testan, supra*, 424 U.S. at 400-01 (1976); *United States v. Mitchell*, 591 F.2d 1300 (Ct. Cl. 1979), *rev'd on other grounds*, 445 U.S. 535 (1980).[1] Respondents' other claims—principally those based upon the Government's breach of its statutory duties to obtain fair market value for timber sold and to manage timber on a sustained-yield basis (Petition, at 5)—have been determined by the Court of Claims, in accordance with *Testan*, to be founded upon "federal statutes that . . . confer a substantive right to recover money damages from the United States . . . ." *See United States v. Testan, supra*, 424 U.S. at 398.[2]

Respondents accept as accurate the Statement of the Case set forth at pages 2 through 12 of the Government's petition, except that they would add three points. First, the control which the Government exercises over respondents' timber is exclusive and comprehensive. The respondent Indians do not live on their timbered allotments and, in most cases, do not even know much about them. Few of them have any knowledge of timber man-

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[1] The United States admits as much in its petition to this Court. *See* Petition, at 16.

[2] Respondents submit that *all* of their claims should be treated as the equivalent of claims "for money improperly exacted or retained." Having taken the respondents' timber property in trust—and having undertaken the fiduciary duty of converting that property into cash and of paying that cash to the respondents—the United States should not now be heard to argue that its possession of the trust *res* does not constitute the equivalent of "exaction or retention" of respondents' property.

agement techniques, and all of them rely entirely upon the Government to manage their timber trust property. *See also* note 5 *infra*. Second, the allegations of respondents' petition to the Court of Claims—essentially, that the Government's mismanagement caused part of the value of their timber resources to be transferred to others without full consideration, or to be wasted—must be taken as true in the context of the Government's effort to secure dismissal for lack of jurisdiction. Finally, the Government is not a gratuitous trustee; it charges a substantial fee (up to 10 percent of the sales proceeds) for the services it performs as trustee. Such a fee was authorized by Congress (25 U.S.C. § 413) and upheld by the Court of Claims in *Capoeman v. United States*, 440 F.2d 1002 (Ct. Cl. 1971).

REASONS FOR DENYING THE PETITION

I. Congress has imposed specific fiduciary duties upon the United States in the management and sale of Indian timber property; mandated the payment of money to the beneficial Indian owners of such property; and authorized suit in the Court of Claims for damages incurred as a result of violations of those duties.

Although this Court has said that a waiver of federal sovereign immunity "cannot be implied but must be unequivocably expressed,"[3] it has also said that such a waiver may be found if the statutory basis of the claim "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *United States v. Testan*, *supra*, 424 U.S. at 402.

Respondents submit that the federal statutes and regulations governing the management and sale of Indian timber trust resources—which mandate that such management and sale be conducted so as to convert the In-

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[3] *United States v. Mitchell*, 445 U.S. 535, 538 (1980), *quoting United States v. King*, 395 U.S. 1, 4 (1969).

dians' trust property into its full monetary equivalent for the benefit of the Indians and that all such proceeds (less administrative fees deducted by the Government for its services) be paid to them or used for their benefit—cannot fairly be construed otherwise than to "mandate compensation." As this Court stated in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 149 (1980), the statutes upon which the respondents rely were enacted by Congress in order to achieve

> the overriding federal objective of guaranteeing the Indians that they will "receive . . . the benefit of whatever profit [the forest] is capable of yielding. . . ."

See also id. at 147.

Responsibility for the management and disposition of the timber resources of lands allotted to individual Indians is vested in the Secretary of the Interior (43 U.S.C. § 1457) and exercised by the Interior Department's Bureau of Indian Affairs (BIA) (25 U.S.C. § 2). *See* 25 U.S.C. §§ 406-07 (timber sales); 25 U.S.C. § 466 (regulations and sustained-yield management); 25 U.S.C. §§ 318a, 323-25 (rights-of-way); 25 C.F.R. §§ 141.1-141.23 (1981).[4] Pursuant to those statutes and regulations, the BIA has continuously exercised close and pervasive control and supervision over respondents' lands and timber.

By the Act of June 25, 1910, § 7, 36 Stat. 855, the Secretary of the Interior was authorized to sell timber from allotted Indian trust lands. The 1910 Act was amended in 1964 to reiterate and emphasize both the monetary goal of the Government's duty and the fact that that duty must be exercised in such a way as best to serve the monetary interest of the timber's beneficial owners. As amended in 1964, 25 U.S.C. § 406(a) reads today as follows:

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[4] *See also* 25 U.S.C. § 413 (administrative fees); 25 U.S.C. §§ 349, 372 (fee patents); 25 U.S.C. § 162a (funds).

(a) The timber on any Indian land held under a trust or other patent containing restrictions on alienations may be sold by the owner or owners with the consent of the Secretary of the Interior,[5] and the proceeds from such sales, after deductions for administrative expenses to the extent permissible under section 413 of this title shall be paid to the owner or owners or disposed of for their benefit under regulations to be prescribed by the Secretary of the Interior. It is the intention of Congress that a deduction for administrative expenses may be made in any case unless the deduction would violate a treaty obligation or amount to a taking of private property for public use without just compensation in violation of the fifth amendment to the Constitution. *Sales of timber under this subsection shall be based*

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[5] The statutory phraseology, "sold by the owner . . . with the consent of the Secretary," does not convey the nature of actual practice on the Quinault Reservation. In fact, it was the BIA that determined which blocks of timber would be put up for sale. The BIA then secured powers-of-attorney from the allottee owners and handled every detailed aspect of the sale—including advertising for bids, letting contracts and supervising the loggers who build roads, cut the timber and haul it off. The BIA saw to the counting and grading of logs, collected the money, deducted its fee, and credited the balance to the allottees' (or the Tribe's) BIA accounts. The Indians (who do not live on their timbered allotments) had little or nothing to do with the entire operation, except signing the initial power-of-attorney, and opening the envelope with the check. The Indian owner is not even allowed to cut and sell timber from his own allotment without the permission of the BIA (which permission will not ordinarily be given unless the proposed cutting and selling fits into the Secretary's overall management plan) and without posting a bond to assure compliance with the BIA's harvesting regulations. The 1964 amendment (quoted in the text) uses language which reflects the actuality of what has been the Secretary's full control since 1910. *See also United States v. Eastman*, 118 F.2d 421, 424 (9th Cir.), *cert. denied*, 314 U.S. 635 (1941) (recognizing that actuality); *White Mountain Apache Tribe v. Bracker*, *supra*, 448 U.S. at 145-48 (description of similarly pervasive BIA control over timberlands of the Fort Apache Reservation, Arizona).

> *upon a consideration of the needs and best interests of the Indian owner and his heirs. The Secretary shall take into consideration,* among other things, (1) the state of growth of the timber and *the need for maintaining the productive capacity of the land for the benefit of the owner and his heirs,* (2) *the highest and best use of the land,* including the advisability and practicality of devoting it to other uses for the benefit of the owner and his heirs, and (3) *the present and future financial needs of the owner and his heirs.* [Emphasis added.] [6]

In this context, the statutory requirement that the Secretary pay "the proceeds from such sales" (line 5 in the quote above) to the Indian owners of the timber cannot fairly be read otherwise than to mandate the payment of those proceeds that will be produced by prudent management in accordance with statutory guidelines. This conclusion is strengthened by the fact that the Government collects a fee from the Indians for its management services (25 U.S.C. § 413).

Even in 1910, Congress was concerned that the Indians receive from their timber "whatever profit it is capable of yielding" (*White Mountain Apache Tribe v. Bracker, supra,* 448 U.S. at 147), and it knew that this could occur only if the timber resources were properly managed.[7] In passing the 1910 statute, Congress "presumed that there will be regulations under which the timber . . . shall be cut," and it realized fully that placing the management

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[6] *See also* 25 U.S.C. § 407 (timber sales on unallotted trust lands).

[7] The only benefit the respondents receive from their allotted timber resources is the payment of money upon the sale of their timber by the BIA. The duty of the Government to manage and sell those resources in a prudent and proper manner is indeed (contrary to the suggestion of the Government in its petition to this Court) "essentially monetary in character." *See* Petition, at 15. Proper execution by the Government of its duty is mandated by Congress in order to assure that respondents will receive their proper monetary return from their allotments.

of the timber in the hands of federal officials would "make it their duty" to "supervise its cutting in the Indian reservation." 45 Cong. Rec. 6087-88 (1910).

The Interior Department itself recognized this duty. In 1911, the Indian Service (predecessor to the BIA) promulgated its first regulations under the 1910 Act and, in doing so, specifically recognized that its duty under that statute carried with it the responsibility of

> so managing the Indian forests as *to obtain the greatest revenue for the Indians* consistent with a proper protection and improvement of the forest.[8]

The 1911 regulations were slightly revised in 1918, 1927 and 1936, and today appear primarily in 25 C.F.R. Part 141. From these regulations it is clear that the BIA recognizes that it is required by 25 U.S.C. § 406 to manage the Indian timber so as to convert it to income, at a price commensurate with its worth and consistent with sound silvicultural techniques, and to pay the proceeds (less administrative fees) to the Indian owners.

In 1934, Congress acted with even more specificity in seeking to assure the Indians the full prudent realization from their timber resources. Section 6 of the Indian Reorganization Act, 25 U.S.C. § 466, provides in pertinent part as follows:

> The Secretary of the Interior is directed to make rules and regulations for the operation and manage-

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[8] Plaintiffs' Exhibit DT 3.3-1.1, at 4 (emphasis added). In treating the Indian Service's timber sale duties, those regulations addressed in detail such matters as size of sales, contract forms and number of copies, advertisements and methods of billing, deposits and bonding requirements, contract approval procedures, methods of payment, time for cutting the timber, administrative fee deductions and expenses to be covered thereby, procedures for sales by minors, allowable height of stumps, base and top diameters of trees for cutting, tree marking and scaling rules, percentage of trees to be left as a seed source, branding of logs and slash disposal. *Id.* at 8-28.

> ment of Indian forestry units on the principle of sustained-yield management . . . .

The need for such specific legislation was explained as follows:

> The bill seeks, through Section 6, *to assure a proper and permanent management of the Indian forest* and grazing lands *and makes such management mandatory on the Secretary of the Interior* instead of optional, as at present. It seeks to prevent the destructive use of Indian forests and range lands. It directs the Secretary of the Interior to place the Indian forests, comprising some 3,000,000 acres of highly valuable and productive timber land, on a basis of permanent sustained-yield management, which means that hereafter the annual cut of timber will be restricted to the annual growth capacity of the forest, with continuous reforestation as the cutting proceeds. *This will assure that the Indian forest will be permanently productive and will yield continuous revenue to the tribes.*[9]

Commissioner of Indian Affairs John Collier testified in favor of the legislation, noting that "there must be a constructive handling of Indian timber." [10] In recognition of the mandatory nature of the statute, Collier pointed out: "The declaration that sustained-yield shall be practiced in the forest is very important. It is a direction." [11] Interestingly, he went on to discuss an earlier attempt by Congress to apply the principle of sustained-yield man-

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[9] 78 Cong. Rec. 11730 (1934) (emphasis added). In fact, the 1934 statute enacted into law a congressional expectation which had been expressed at the time of the 1910 Act's passage. *See* 45 Cong. Rec. 6087 (1910). The same principles apply with regard to allotted lands beneficially owned by individual Indians. *See* 25 C.F.R. §§ 141.1(a), 141.3(b), 141.7 (1981).

[10] *Hearings on H.R. 7902 Before the House Comm. on Indian Affairs*, 73d Cong., 2d Sess., pt. 2, at 35 (1934).

[11] *Id.*, pt. 4, at 131.

agement to the timber lands of the Menominee Tribe in Wisconsin. Unfortunately, the principle

> was not followed by the Department. Much of their timber was devastated, and, as a result, they have a claim against the Government, an assertable and collectible claim, that they were protected by a specific direction from Congress that the timber should be operated on a perpetual yield basis. The other Tribes are entitled to similar protection.[12]

Regulations were first promulgated under this statute in 1936.[13] They required the preservation of Indian forest lands in a perpetually productive state, forbade the clear-cutting of large contiguous areas, required adequate provision for new growth when mature timber is removed, required the regulation of run-off and the minimization of erosion, called for the development of working plans for all reservations of major importance with a definite program for action for a specific time in the future, governed slash disposal, required the location and construction of logging roads so as to minimize erosion, and mandated that the Indians receive "whatever profit [the forest] is capable of yielding." [14]

Thus, federal law directs not only *that* the Interior Department manage allotted Indian timber resources and pay the proceeds to the Indian owners of those resources —it also dictates to a large degree *how* those resources

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[12] *Id.* The Menominees did indeed later prevail upon their claim under the Act of March 28, 1908, 35 Stat. 51, regarding the failure of the Interior Department to manage their forest on a sustained-yield basis. *See Menominee Tribe v. United States*, 117 Ct. Cl. 442 (1950).

[13] *See* Plaintiffs' Exhibit DT 3.3-1.3.

[14] The regulations are quoted in *White Mountain Apache Tribe v. Bracker*, *supra*, 448 U.S. at 149. The regulations remain essentially unchanged today. *See* 25 C.F.R. Part 141 (1981).

are to be managed [15] in order that the Indians will receive the proper monetary benefit therefrom.

In the face of the above-quoted statutes, which contemplate and require that Indian timber be converted into cash income for its Indian owners, it is inconceivable that Congress intended that the Government, a paid trustee, may waste, dissipate and mismanage Indian timber without being required to restore the cash income lost by the Indians as a result of such mismanagement. Indeed, Congress intended the contrary. As Congressman Jackson noted during consideration of the bill which would become the "Indian Tucker Act" (28 U.S.C. § 1505):

> The Interior Department itself has suggested that it ought not be in a position where its employees can mishandle funds and lands of a national trusteeship without complete accountability. . . . [L]et us see that the Indians have their fair day in court so that they can call the various Government agencies to account on the obligations that the Federal Government assumed.[16]

The substantive right of the respondents to receive full payment for their timber resources properly managed is clear; they are entitled to receive "the benefit of whatever profit [the forest] is capable of yielding." *White Mountain Apache Tribe v. Bracker*, *supra*, 448 U.S. at 149; 25 C.F.R. § 141.3(a)(3) (1981). If, as respondents assert, the statutory trust management scheme applied on the Quinault Reservation created a "right to payment of money," it follows, as even the Government

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[15] *See also* 25 U.S.C. §§ 318a, 323-325 (Government responsible for provision and maintenance of roads and rights-of-way).

[16] 92 Cong. Rec. 5312 (1946). *See also* H.R. Rep. No. 1466, 79th Cong., 2d Sess., *reprinted in* 1946 *U.S. Code Cong. & Ad. News* 1347, 1351.

admits, that the statutes which create these rights must "be interpreted as mandating the availability of a damages remedy; without the damages remedy the substantive right would be empty." Petition, at 14, *citing, inter alia, United States v. Hvoslef*, 237 U.S. 1, 10 (1915); *Medbury v. United States*, 173 U.S. 492, 497 (1899); *Mosca v. United States*, 417 F.2d 1382, 1385 (Ct. Cl. 1969); *cf., United States v. Testan, supra*, 424 U.S. at 398, 400, 402; *Eastport S.S. Corp. v. United States*, 372 F.2d 1002, 1007-09 (Ct. Cl. 1967). Respondents clearly should be permitted to seek recourse in the Court of Claims, as Congress contemplated (*see* quotation on previous page).

Not surprisingly, the United States attempts to conjure up the ominous spectre that maintenance of respondents' claims will open the floodgates to limitless raids on the federal treasury: "Damages claimed in this suit alone may aggregate $100 million and other similar suits will assuredly follow in its wake." Petition, at 24.[17] Respondents are at somewhat of a loss as to how to respond to this spectre. They have never alleged how much money they have lost, simply because they do not yet know the amount. An award of the size speculated by the Government would, of course, be welcome to respondents; but the realities of this lawsuit and the tra-

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[17] The Government points to no other Indian reservations on which the United States, as a paid trustee, has so grossly mismanaged Indian timber resources, in violation of specific statutes and regulations, as to give rise to any "other similar suits." Hopefully, there are none. Furthermore, if there are any other such instances, the victims of such misconduct—like the respondents here—most certainly should be permitted judicial recourse; the United States having undertaken the trust relationship (for a fee), resolving doubts about sovereign immunity *against* the Indian cestuis would be inconsistent with the very trust relationship assumed by the United States.

ditionally conservative approach taken by the Court of Claims in similar suits (*see, e.g., Coast Indian Community v. United States*, 213 Ct. Cl. 129, 550 F.2d 639 (1977)) strongly suggest that the Government's $100-million figure is mere hyperbole.

The Government's suggestion (Petition, at 19) that the respondents find recourse in an action for declaratory, injunctive or mandamus relief hardly merits response. By the time respondents learned that their timber had been mismanaged, their losses had already been incurred, and they cannot be made whole unless the United States is required to compensate them for those losses. *See* 664 F.2d at 272 and nn.11, 12. In this regard, it should also be noted that respondents' predecessors *did* seek injunctive relief some forty years ago, but were rebuffed for lack of the United States' consent to be sued. *See United States v. Eastman*, *supra* note 5.

II. The decision below is based upon and consistent with prior decisions of this Court.

It is untrue that the decision below "represents a significant departure from the teaching of this Court" on the issue of the Government's liability for money damages. *See* Petition, at 12. As discussed in the foregoing section, the decision of which review is now sought was rendered expressly on the basis of the principles articulated by this Court in *United States v. Testan* and *United States v. Mitchell*, 445 U.S. 535 (1980) (*"Mitchell I"*). That the Court of Claims found jurisdiction here, whereas jurisdiction was lacking in those earlier cases, is hardly surprising. What most fundamentally distinguishes the instant case from both *Testan* and *Mitchell I* is the fact that the statutes on the basis of which the Court of Claims found jurisdiction here created a special trust relationship in which the United States expressly assumed specific, statutorily mandated duties for the monetary benefit of the Indians whose timber lands the United States holds in trust and administers.

Testan, of course, involved no trust relationship at all. And, in *Mitchell I*, there was no trust that included any duty to manage timber—this Court ruled that the General Allotment Act of 1887, 25 U.S.C. §§ 331-358, "created only a limited trust relationship between the United States and the allottee that does not impose any duty upon the Government to manage timber resources." 445 U.S. at 542. Indeed, the Court said, that statute "should not be read as authorizing, much less requiring, the Government to manage timber resources for the benefit of Indian allottees." *Id.* at 545.

But the Indian timber management and sales statutes now before the Court present an entirely different situation. They *do* add specific timber management duties to the limited General Allotment Act trust relationship—duties which must be faithfully executed if the trust beneficiaries are to realize the full "benefit of whatever profit [the timber] is capable of yielding." *White Mountain Apache Tribe v. Bracker*, *supra*, 448 U.S. at 149.

The Government does not deny that it assumed the special obligations of a trustee when, acting pursuant to specific congressional directive, it undertook comprehensively to manage the individually and tribally owned timber resources of the Quinault Indian Reservation.[18]

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[18] *See* Petition, at 20; notes 4-16 *supra* and accompanying text. The trust responsibilities of the United States with respect to its management of the allotted timber resources of the Quinault Reservation have received congressional recognition and attention. Following oversight hearings in 1957, the Indian Affairs Subcommittee of the Senate Committee on Interior and Insular Affairs issued a report which was highly critical of the BIA's failure to manage those resources properly. *See* S. Rep. No. 971, 85th Cong., 1st Sess. 508 (1957) (Plaintiffs' Exhibit DT 19.10-20). Even the minority, which disputed some of the more critical conclusions of the report, acknowledged specifically that "the Bureau functions as a trustee" and that "there are certain phases of the trust responsibility that cannot be relinquished without the consent of the Congress." *Id.* at 82.

Nor can the Government, at this preliminary stage of this litigation, deny that it has violated its special obligations, ignored its congressional mandate, and failed to pay to its cestuis the money to which they are, by statute, entitled.

Far from representing a bold venture into uncharted jurisdictional waters, respondents' attempt to seek recompense for the wrongs done to them by their trustee rests comfortably within the traditional jurisdiction of the Court of Claims. The Court of Claims ruled as early as 1966 (apparently the first case raising the question since the "Indian Tucker Act," 28 U.S.C. § 1505, was passed in 1946) that the United States must respond in damages for losses caused by its breach of trust responsibilities to Indians. *See Klamath & Modoc Tribes v. United States*, 174 Ct. Cl. 483 (1966).

In many cases thereafter, this ruling was not questioned,[19] including one case that reached this Court.[20] It was only after this Court decided *Testan* (a non-trust case) in 1976 that the Government thought to reargue the consent-to-suit issue in an Indian trust case. It is the Government that seeks to change the law, not the respondents.

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[19] *See Navajo Tribe v. United States*, 364 F.2d 320 (Ct. Cl. 1966); *Fields v. United States*, 423 F.2d 380 (Ct. Cl. 1970); *Hebah v. United States*, 428 F.2d 1334 (Ct. Cl. 1970); *Capoeman v. United States*, 440 F.2d 1002 (Ct. Cl. 1971); *Quinault Allottee Ass'n v. United States*, 453 F.2d 1272 (Ct. Cl. 1972); *Quinault Allottee Ass'n v. United States*, 485 F.2d 1391 (Ct. Cl. 1973), *cert. denied*, 416 U.S. 961 (1974); *Mason v. United States*, 461 F.2d 1364 (Ct. Cl. 1972), *rev'd on the merits*, 412 U.S. 391 (1973); *Cheyenne-Arapahoe Tribes v. United States*, 512 F.2d 1390 (Ct. Cl. 1975); *Coast Indian Community v. United States*, 550 F.2d 639 (Ct. Cl. 1977). *See also Whiskers v. United States*, 600 F.2d 1332 (10th Cir. 1979), *cert. denied*, 444 U.S. 1078 (1980); *Smith v. United States*, 515 F. Supp. 56 (N.D.Cal. 1978); *Manchester Band of Pomo Indians v. United States*, 363 F.Supp. 1238 (N.D. Cal. 1973).

[20] *United States v. Mason*, 412 U.S. 391, 398 (1973).

Significantly, the *Klamath* case was decided by the same judges and during the same year as *Eastport S.S. Corp. v. United States*, 372 F.2d 1002 (Ct. Cl. 1967), in which the Court of Claims enunciated the "fairly mandating compensation" standard for jurisdiction which this Court adopted in *Testan*.

Judicial curtailment of the proper jurisdiction of the Court of Claims to hear grievances such as respondents' would be unwarranted. Respondents should be permitted to go forward and prove their case.

CONCLUSION

For the foregoing reasons, respondents urge that the Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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May 5, 1982

Petitioner's Brief

Office - Supreme Court, U.S.
FILED
SEP 8 1982
L. STEVAS,
CLERK

No. 81-1748

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

HELEN MITCHELL, ET. AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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QUESTION PRESENTED

Whether the United States is accountable in money damages for alleged breaches of trust in connection with its management of forest resources situated on allotted lands of the Quinault Indian Reservation.

PARTIES TO THE PROCEEDINGS

The respondents are a class of 1,465 individuals owning interests in allotments on the Quinault Indian Reservation, the Quinault Tribe, and the Quinault Allottees Association, an unincorporated association of Quinault Reservation allottees. This case was maintained as a class action (albeit an "opt-in" class action) in the Court of Claims and no complete listing of the individual class members is available to us. We have determined that neither respondents' counsel nor the Court of Claims possesses such a listing.

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In the Supreme Court of the United States

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No. 81-1748

UNITED STATES OF AMERICA, PETITIONER

v.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Claims (Pet. App. 1a-42a) is reported at 664 F.2d 265.

JURISDICTION

The decision of the Court of Claims was filed on October 21, 1981.[1] On January 14, 1982, the Chief Justice extended the time for filing a petition for a writ of certiorari to and including March 20, 1982. The petition for a writ of certiorari was filed on March 19, 1982, and was granted on June 7, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

[1] Following the practice of that court, no judgment separate from the opinion of the court was issued.

STATUTES INVOLVED

Because of their number and considerable length, the relevant statutes, Sections 7 and 8 of the Act of June 25, 1910, ch. 431, 36 Stat. 857, as amended by Pub. L. No. 88-301, 78 Stat. 186-187, 25 U.S.C. 407 and 406; Section 6 of the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 986, 25 U.S.C. 466; the Act of May 26, 1928, ch. 756, 45 Stat. 750, 25 U.S.C. 318a; Sections 1-3 of the Act of February 5, 1948, ch. 45, 62 Stat. 17-18, 25 U.S.C. 323-325; and Section 1 of the Act of June 24, 1938, ch. 648, 52 Stat. 1037, 25 U.S.C. 162a, are reproduced in the Appendix to this brief.

STATEMENT

1. In four actions consolidated before the Court of Claims, respondents seek to recover damages from the United States for the alleged mismanagement of timber resources on lands allotted to individual Indians from the Quinault Reservation in the State of Washington. The respondents are 1,465 individuals owning interests in such allotments, the Quinault Tribe, which now holds portions of the allotted lands, and an unincorporated association of Quinault Reservation allottees.

The Quinault Reservation was established in 1873 by an Executive Order, I. C. Kappler, *Indian Affairs* 923 (2d ed. 1904), that implemented the Treaty between the United States and the Qui-nai-elt and the Quil-leh-ute Indians of July 1, 1855 ("Treaty of Olympia"), 12 Stat. 971. Between 1905 and 1935 the entire reservation was allotted to individual Indians under the General Allotment Act of 1887, ch. 119, 24 Stat. 388, 25 U.S.C. 331, *et seq.* Section 5 of that Act provided that the United States would "hold the land thus allotted, for the period of twenty-five years,

in trust for the sole use and benefit of the Indian to whom such allotment shall have been made * * *." The period during which the United States was to hold the land thus allotted was subsequently extended indefinitely by the Indian Reorganization Act of 1934, ch. 576, Section 2, 48 Stat. 984, 25 U.S.C. 462.

Much of the land within the Quinault Reservation is heavily forested.[2] The forest resources on the allotted lands have been managed by the Department of the Interior, which has sold the timber from individual allotments and managed the revenue from the sales. The Secretary of the Interior was first authorized to approve the sale by the allottee of timber on any Indian land "held under a trust or other patent containing restrictions on alienations" by Section 8 of the Act of June 25, 1910, ch. 431, 36 Stat. 857, 25 U.S.C. 406. See *United States* v. *Mitchell*, 445 U.S. 535, 545-546 (1980).[3] Since 1934, the Sec-

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[2] In the early years of this century, the government concluded that the forested areas of the Quinault Reservation were not to be allotted pursuant to the General Allotment Act because they were not suited for the "agricultural or grazing purposes" contemplated by Congress. See 25 U.S.C. 331. This Court rejected the government's position in *United States* v. *Payne*, 264 U.S. 446 (1924), observing that forested lands could be cleared for cultivation, and concluding that the General Allotment Act did not preclude "an allotment of timbered lands, capable of being cleared and cultivated * * *." 264 U.S. at 449. Following the decision in *Payne* the forested lands of the Quinault Reservation were allotted, a process that was completed by 1935.

[3] Prior to the enactment of a 1964 amendment, Pub. L. No. 88-301, 78 Stat. 187, Section 406 (25 U.S.C. (1958 ed.)) provided:

> The timber on any Indian allotment held under a trust or other patent containing restrictions on alienations may be sold by the allottee, with the consent of the Secretary of the Interior, and the proceeds thereof shall be

retary has been directed to adhere to the principles of sustained-yield forestry on all Indian forest lands under his supervision. 25 U.S.C. 466. And since 1964, 25 U.S. 406 has required the Secretary to consider, *inter alia*, the state of growth of the timber and the present and future financial needs of the allottee and his heirs in making his decisions respecting timber sales.[4] Finally, the Secretary is authorized to deduct an administrative fee for his services from the timber revenues paid out to the Indian allottees. 25 U.S.C. 406(a), 413. Under this statutory authority the Secretary of the Interior has developed a detailed set of regulations, 25 C.F.R. Part 141, governing sale and harvesting of Indian timber, and has the power to exercise day to day supervision over the harvesting and management of timber. See generally, *White Mountain Apache Tribe* v. *Bracker*, 448 U.S. 136, 145-147 (1980).

In their claims, filed commencing in 1971, respondents have alleged that the Secretary has engaged in several improper practices in connection with his management of timber lands allotted from the Quinault

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paid to the allottee or disposed of for his benefit under regulations to be prescribed by the Secretary of the Interior.

[4] As amended, Section 406 provides in pertinent part:

Sales of timber under this subsection shall be based upon a consideration of the needs and best interests of the Indian owner and his heirs. The Secretary shall take into consideration, among other things, (1) the state of growth of the timber and the need for maintaining the productive capacity of the land for the benefit of the owner and his heirs, (2) the highest and best use of the land, including the advisability and practicability of devoting it to other uses for the benefit of the owner and his heirs and (3) the present and future financial needs of the owner and his heirs.

Reservation. Specifically, they claim that he has (Pet. App. 2a-3a):

(1) failed to obtain a fair market value for timber sold;
(2) failed to manage timber on a sustained yield basis;
(3) failed to obtain payment for some merchantable timber;
(4) failed to develop a proper system of roads and easements, and exacted improper charges from allottees for roads;
(5) failed to pay interest on certain funds;
(6) paid insufficient interest on certain funds; and
(7) exacted excessive administrative fees from allottees.

Respondents contend that they are entitled to recover money damages for the alleged misdeeds because the Secretary's actions have breached a fiduciary duty owed them by the United States as trustee under various statutes.

2. In *United States* v. *Mitchell*, 445 U.S. 535 (1980), this Court reversed an earlier decision of the Court of Claims in this case, *Mitchell* v. *United States*, 591 F.2d 1300 (Ct. Cl. 1979) (*Mitchell I*), and remanded the case to that court for further proceedings that culminated in the decision that we now tender for review.

a. In 1977, following this Court's decision in *United States* v. *Testan*, 424 U.S. 392 (1976), the United States had moved to dismiss respondents' actions on the ground that the United States had not consented to maintenance of these suits or otherwise waived its sovereign immunity in respect of such claims. In response, in *Mitchell I*, a unanimous en banc Court of Claims held that Section 5 of the General Allotment Act, 25 U.S.C. 348,

which recites that allotments are to be held in trust by the United States for the benefit of the Indian allottee, creates an express trust relationship (591 F.2d at 1302), and that the availability of a damages remedy against the United States was "the necessary inference from the statute" (*ibid.*) because, in the court's view, injunctive or other prospective relief would be an inadequate remedy for the injuries alleged here (*id.* at 1302-1303).

Because the Court of Claims concluded that the General Allotment Act itself provided the necessary authority for recovery of damages for the United States' alleged failure properly to manage the forest resources of the Quinault allotments (591 F.2d at 1302 n.11), the court did not address the sufficiency of alternative statutory bases for recovery of damages advanced by respondents. These included the timber management statutes, 25 U.S.C. 406, 407, 413 and 466 (see pages 3-4, *supra*), as well as 25 U.S.C. 349 and 372, which govern issuance of fee patents to allottees; 25 U.S.C. 318a, which authorizes expenditure of funds in the Treasury for construction of roads on Indian reservations; 25 U.S.C. 323-325, which regulate grants of rights of way across Indian lands; and 25 U.S.C. 162a, which addresses investment of tribal and individual Indian funds. See 591 F.2d at 1304-1305 & n.18. Instead, the Court of Claims merely stated that "these additional statutes furnish statutory directives—substantive rules of conduct" that should be taken into account as "congressional gauges of proper trustee conduct" in "deciding whether the Government violated its obligations as trustee under the General Allotment Act" (*id.* at 1305). Finally, the Court of Claims noted that "there is undoubtedly jurisdiction in this court, aside from any trust relationship under those statutes, over the claims in which plaintiffs seek to re-

cover their own monies retained or deducted by the Government—unreasonable fees and service charges deducted for work performed by the [United States]; improper deduction of road maintenance costs; and any other claims that the Government illegally kept some of the Indians' own money and property" (*id.* at 1305 n.19; citation omitted).

b. As indicated above, however, this Court reversed the judgment of the Court of Claims. *United States* v. *Mitchell*, *supra*, 445 U.S. 535. Based upon the language and legislative history of Section 5 of the General Allotment Act, which recites that the allotted lands are to be held in trust tenure, and events surrounding and following the passage of that Act (445 U.S. at 542-546), the Court concluded that the Act "created only a limited trust relationship between the United States and the allottees that does not impose any duty upon the Government to manage timber resoures" (*id.* at 542). The "trust" language of Section 5, the Court stated, was not intended to impose fiduciary management duties, or to render the United States answerable in damages for breach thereof, but only to prevent improvident alienation of the allotted lands and assure their immunity from state taxation (*id.* at 544). The Court accordingly declined to "consider whether, had Congress actually intended * * * to impose upon the Government all fiduciary duties ordinarily placed by equity upon a trustee, the Act would constitute a waiver of sovereign immunity" (*id.* at 542).

Because the Court of Claims had not passed upon them, the Court declined to consider, in the first instance, alternative bases advanced by respondents in support of their action for damages, including the statutes that govern the Secretary's management of Indian forest lands and other properties (see page 6, *supra*), the "special relationship" between the United

States and Indian tribes, and an implied contract argument. See 445 U.S. at 546 n.7. Rather, concluding that "[a]ny right of respondents to recover money damages for Government mismanagement of timber resources must be found in some source other than the [General Allotment] Act" (*id.* at 546), the Court remanded for further proceedings in the Court of Claims.[5]

3. On remand, the Court of Claims, again sitting en banc, again held the United States subject to suit for money damages on most of the claims advanced by respondents (Pet. App. 1a-23a). This time Judge Nichols dissented in substantial part (*id.* at 23a-42a).

The Court of Claims acknowledged that claims for money damages not resting on a contract or seeking recovery of money wrongfully held by the government, must rest upon a statute, regulation, or constitutional provision that may fairly be " 'interpreted as mandating compensation by the Federal Government for the damage sustained' " (Pet. App. 3a-4a, quoting *United States* v. *Testan*, 424 U.S. 392, 400 (1976)), and that a substantive right enforceable by declaratory or injunctive relief is insufficient to authorize recovery of damages (Pet. App. 4a). The court reasoned, however, that "[i]t is not required * * * that the statute, regulation, or order itself specify that the claimant can bring a lawsuit for compensation" (Pet. App. 4a). Rather, the Court of Claims concluded the United States may be sued for money damages whenever "legislation [or an administrative measure] directs

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[5] Justice White, joined by Justices Brennan and Stevens, dissented from the Court's disposition, concluding that the General Allotment Act created a true trust encompassing forestry management duties (445 U.S. at 547-549) and that liability in damages follows from "the existence of a trust and fiduciary duties" (*id.* at 550). The Chief Justice did not participate in the decision.

* * * money to be paid to the claimant * * *" (*id.* at 5a). The court refused, moreover, to confine implication of a right to recover money damages against the United States to actions resting upon an alleged violation of a statute that directs payment of money (*id.* at 5a-6a).

Turning to the statutes upon which respondents relied, the court held that the timber management statutes (25 U.S.C. 406, 407 and 466) and the statutes governing road building and rights of way (25 U.S.C. 318a and 323-325) created fiduciary duties respecting management of forested allotted lands, and gave rise to monetary liability for breach of that duty (Pet. App. 6a-17a). In this connection, the court noted first the comprehensive character of federal oversight of Indian forestry activities (*id.* at 7a-8a). Next, the court concluded that although no express trust was established by these statutes, a "long-continuing doctrine of governmental fiduciary obligation in the management of Indian property was * * * infused into" the governing statutes (*id.* at 9a),[6] and that those statutes "have broadened the special trust imposed by the Allotment Act to create a general fiduciary obligation on the Government in the operation and management of the forest lands with which Interior was entrusted" (*ibid.*).

Having determined that the United States bore the obligations of a general trustee, the court examined

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[6] The court stated (Pet. App. 8a; citing *Navajo Tribe of Indians* v. *United States*, 624 F.2d 981, 987 (Ct. Cl. 1980)):

> We have held that "where the Federal Government takes on or has control or supervision over tribal monies or properties, the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection."

the particular statutes at issue, concluding that they embody congressional consent to maintenance of an action for damages for breach of fiduciary duty (Pet. App. 9a-16a). The timber management statutes, the court concluded, reflected a congressional intent to maximize Indian revenues for the long term. The court could see no room to question that an action could be maintained to compel the United States to disgorge the actual proceeds of timber sales. Relying principally upon the law of private trusts and the perceived inadequacy of prospective equitable remedies, however, the court refused to "confine the Indians to the actual proceeds of actual sales" (*id.* at 12a), extending the monetary remedy to recovery of any additional sums that would have been earned by a properly viligant fiduciary (*id.* at 11a-15a). Similar reasoning was employed to infer from the various road construction and right-of-way statutes the right to recover damages for failure to secure proper compensation for rights of way granted over Indian lands, and failure properly to maintain rights of way, for levying of road building fees upon the respondents, and for loss of income or property value caused by the Secretary's failure to construct an appropriate road network for proper forest care (*id.* at 15a-16a).[7]

The Court of Claims restricted, to some degree, however, the kinds of injuries for which damages might be recovered under the timber management and

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[7] By contrast, the court found no right to recovery for alleged improvident issuance of fee patents to individual allottees under 25 U.S.C. 349 and 377. The court concluded that those statutes are "almost purely regulatory" and "suggest[] little of the assumption of fiduciary responsibility," adding that the General Allotment Act itself—of which 25 U.S.C. 349 is a part—as construed in this Court's *Mitchell I* decision, did not include a true fiduciary or guardianship relationship toward the Indian owners (Pet. App. 21a & n.18).

right-of-way statutes. Respondents might secure damages for (Pet. App. 10a-11a):

> (a) any fall-off from the income they would have received from their forests and lands if the Government had properly complied with the directives of the statutes and regulations, and (b) the value (or decrease in value) of their property which is lost (or diminished in value) through improper actions of Interior.[8]

Damages for consequential or indirect injury, whether economic, social, or psychological in character, were disallowed (*id.* at 11a, 16a-18a). The court reasoned that the latter were not within the contemplation of Congress (*id.* at 18a).

In addition to holding that monetary liability may be fastened upon the United States for any proven mismanagement of timber resources and rights of way, the Court of Claims held that, under 25 U.S.C. 162a, the respondents were entitled to damages for interest not paid, or paid at a rate reflecting less than "reasonable management zeal to get * * * the best [interest] rate" available for respondents' funds held by the Secretary of the Interior (Pet. App. 19a-20a).[9]

In closing, the Court of Claims treated several other bases for recovery advanced by the respondents. The court reaffirmed (see pages 6-7, *supra*) that dam-

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[8] Disavowing any view as to the merits, the court stated that the standard to be applied in determining liability was whether the conduct of government agents was "in good faith and within the realm of their acceptable discretion," or, by contrast, was "arbitrary, capricious, an abuse of discretion or contrary to law" (Pet. App. 18a & n.15).

[9] No interest was allowed, however, on the other items of damages approved by the Court of Claims, because no statutory authority exists for pre-judgment interest against the United States in these circumstances (Pet. App. 20a).

ages could be awarded in respect of claims resting upon unlawful or excessive charges for administrative fees that had been deducted from revenues owing to respondents (Pet. App. 19a).[10] And the court noted the United States' agreement that damages could be awarded for any taking without just compensation that respondents might establish (*id.* at 21a). Finally the court rejected (*id.* at 22a) respondents' characterization of their claims as grounded upon contracts, express or implied-in-fact, upon which recovery was available even in the absence of a statutory basis outside the Tucker Act.[11]

Explaining that the right of action implied by the majority from the timber management and right-of-way statutes "is in cold reality but a strong and clear wish upon the judge's part" (Pet. App. 25a), Judge Nichols dissented in significant part (*id.* at 32a-42a), concluding that the United States is not answerable in damages for alleged mismanagement of forest resources and rights of way. Judge Nichols joined in the majority's disposition of the remaining claims and theories of recovery.

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[10] The court rejected the government's contention that individual respondents had failed to exhaust administrative remedies through which they might have sought an adjustment of these charges (Pet. App. 22a-23a).

[11] The court simply found no indication that contracts creating management duties existed, noting that the powers of attorney by which the Secretary acted for individual allottees that respondents had pointed to contained no such terms, and that the timber sales contracts themselves ran between the Indian owners and the timber companies and are not enforceable against the United States. A contract implied in law would not support relief, the court observed, granting respondents leave, however, to amend their petitions to allege and demonstrate the existence of, actual express or implied-in-fact contracts (Pet. App. 22a).

SUMMARY OF ARGUMENT

A. The Court of Claims has jurisdiction over individual claims for money damages founded upon an "Act of Congress," 28 U.S.C. 1491, and over tribal claims for money damages based upon the "laws * * * of the United States," 28 U.S.C. 1505. These jurisdictional provisions do not, however, create any substantive right enforceable against the United States. They merely provide jurisdiction for the court to hear such claims "whenever the substantive right exists." *United States* v. *Testan*, 424 U.S. 392, 398 (1976); *United States* v. *Mitchell*, 445 U.S. 535, 538-540 (1980). The applicable rule is that where a claim for money damages is predicated upon an alleged statutory violation, a suit for damages may not be maintained against the United States unless the statute in question "in itself * * * can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *United States* v. *Testan*, *supra*, 424 U.S. at 402, quoting *Eastport Steamship Corp.* v. *United States*, 372 F.2d 1002, 1008-1009 (Ct. Cl. 1967).

None of the statutes from which the Court of Claims inferred a right of action to recover against the United States for alleged mismanagement of Indian forest resources and their proceeds reflects the necessary legislative mandate for the availability of the damages remedy. It may ordinarily be correct, as the Court of Claims suggested, that a statute vesting an individual or members of a designated class with an absolute right to receive a sum certain from an administrative office or officer of the United States grounds an action for the recovery of damages—or at least the sum withheld—in the event of nonpayment. But this is not invariably the case, for the question is ultimately one of discerning legislative intent. In any event, respondents' claims do not rest upon any such

statute, nor did the Court of Claims suggest that they did. Instead, the Court of Claims' decision rests upon the novel proposition that a statute that does not in terms create any right to payment of money nonetheless may support a damage action against the United States. That proposition is difficult indeed to reconcile with this Court's decision in *Testan, supra.* It is also difficult to square with this Court's emphasis in recent cases upon congressional intent as the ultimate standard in determining whether a private right of action should be inferred from a statute that does not, in terms, provide for such an action.

Nothing in the particular statutes from which the Court of Claims extracted a right of action against the United States, or in their legislative histories, supports the decision below. For instance, the timber sale and management statutes, 25 U.S.C. 406 and 466, empower the Secretary to sell timber on allotted lands, provide a generalized standard to guide him in doing so and require adherence to the principles of sustained yield management. Within these confines, the Secretary retains substantial discretion. The only monetary obligation placed upon the Secretary is to pay "the proceeds from such sales * * * to the owner or owners" or otherwise to "dispose[] of [such proceeds] for their benefit under regulations to be prescribed by the Secretary * * *." 25 U.S.C. 406(a). Thus, while we assume that Section 406(a) would ground an action to compel the Secretary to disgorge unlawfully retained proceeds, there is no basis in the statute for extending the monetary remedy to proceeds that arguably should have been, but were not, captured by the Secretary. And the legislative history of the timber sale statutes contains no hint that Congress contemplated subjecting the United States to suit for damages for defective performance of its agents thereunder. The language and legislative his-

tory of the road building, right-of-way, and interest statutes is similarly devoid of any indication that Congress intended such a result.

Contrary to the Court of Claims' assumption, the result of this analysis is not that the respondents were left powerless to enforce the rights that Congress gave them by imposing statutory duties upon the Secretary. On the contrary, respondents simply were remitted to the remedy of timely filing an action for declaratory or injunctive relief so as to correct any perceived maladministration on the part of the Secretary and his subordinates. And if injunctive relief were, as the Court of Claims supposed, a less than completely adequate remedy, it is the necessary corollary of the doctrine of sovereign immunity that the insufficiency of a prospective remedy does not establish the availability of a retrospective damages remedy.

B. The operation of the foregoing principles is not suspended in the setting of this case simply because of the respondents' special status as Indians. Yet the Court of Claims did not purport to engage in an analysis of the statutes and legislative materials in order to discern whether Congress intended that the United States be answerable in damages. Instead the Court of Claims' analysis rests upon two presumptions: that the United States serves as a fiduciary in the management of Indian property even absent any indication of congressional intent that it so serve, and that any violation of a statutory duty so invested with fiduciary overtones grounds an action for the recovery of damages. In short, the Court of Claims has announced a doctrine of presumptive monetary liability for statutory violations in Indian cases.

Nothing in this Court's decisions respecting the special relationship between the United States and

the Indian tribes supports application of this special rule. The Court has on many occasions, we recognize, characterized the special relationship as a "fiduciary," "guardianship" or "trust" relationship. We fully accept the obligations that are imposed by the relationship between the United States and the Indian tribes. These obligations are, in our judgment, enforceable against the Secretary, if need be, in an action for declaratory or injunctive relief, or for judicial review of administrative action. In such litigation, the trust relationship supplies the standard that guides the courts in determining whether the Secretary has abused his discretion in action respecting Indian affairs under authority delegated by Congress.

At the same time, by definition, nothing in the judicially recognized trust relationship can constitute the "affirmative statutory authority" necessary to maintain an action against the United States for the recovery of damages. *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 514 (1940). And this Court's decisions recognizing a special relationship do not suggest otherwise. Rather, the special relationship has been invoked to ward off unauthorized state interference in the relations between the United States and the Indian tribes, to bar exercise of state court jurisdiction over property in which Indians are interested when the United States has not been properly joined and represented, to justify interpretation of ambiguous treaty language in favor of the Indians, to shield the United States from liability under the Just Compensation Clause for acts respecting Indian property undertaken in its capacity as manager of that property, and to underscore the high standards that the United States must meet in its dealings with Indians. But the Court has never invoked this doctrine to suggest that the United States

is answerable in money damages for breaches of the standards applicable to a private fiduciary. Nor do this Court's cases provide any reason for Congress to have assumed that by prescribing statutory duties for the Secretary, it had created a right of action to recover damages for defective performance.

ARGUMENT

THE UNITED STATES MAY NOT BE HELD TO ACCOUNT IN MONEY DAMAGES FOR ALLEGED STATUTORY VIOLATIONS IN CONNECTION WITH ITS MANAGEMENT OF FOREST RESOURCES SITUATED ON ALLOTTED LANDS OF THE QUINAULT INDIAN RESERVATION

A. The Applicable Statutes Do Not Create a Right to Recover Money Damages Against the United States

1. Under the Tucker Act, the Court of Claims has jurisdiction of "any claim against the United States founded either upon the Constitution, or any Act of Congress * * *." 28 U.S.C. 1491. In *United States* v. *Testan*, 424 U.S. 392, 400 (1976), this Court rejected the contention that the jurisdictional provisions of the Tucker Act waive the "sovereign immunity [of the United States] with respect to any claim invoking a constitutional provision or a federal statute * * *." And in *United States* v. *Mitchell*, 445 U.S. 535, 538-540 (1980) (*"Mitchell I"*), this Court held that 28 U.S.C. 1505, the jurisdictional predicate upon which the tribal claimant relies, "no more confers a substantive right against the United States to recover money damages than does 28 U.S.C. 1491" (footnote omitted). Because " 'the only judgments which the Court of Claims [is] authorized to render against the government * * * are judgments for money found due from the government to the [claimant]' " (*United States* v. *King*, 395 U.S. 1, 3 (1969), quoting *United*

States v. *Alire*, 73 U.S. (6 Wall.) 573, 575 (1867)), monetary recovery may be had against the United States upon a claim resting upon "the Constitution or any Act of Congress" only if the constitutional provision or statute relied upon creates a substantive right against the United States for "actual, presently due money damages" (*United States* v. *King*, *supra*, 395 U.S. at 3). The Tucker Act itself does "not create any substantive right enforceable against the United States for money damages"; instead, it merely "confers jurisdiction upon [the Court of Claims] whenever the substantive right exists." *United States* v. *Testan*, *supra*, 424 U.S. at 398.

The principle that governs claims for damages resting upon an alleged statutory violation was reiterated in this Court's decision in *Mitchell I*: "A waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.'" 445 U.S. at 538, quoting *United States* v. *King*, *supra*, 395 U.S. at 4. Where, as here, a claim for money damages is predicated upon an alleged statutory violation, the rule is that no waiver of immunity will be found unless the particular statute "in itself * * * can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." *United States* v. *Testan*, *supra*, 424 U.S. at 402, quoting *Eastport Steamship Corp.* v. *United States*, 372 F.2d 1002, 1008-1009 (Ct. Cl. 1967).[12]

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[12] Here we follow the terminology of this Court's *Testan* and *Mitchell* opinions by speaking of a failure to waive the bar of sovereign immunity. In *Testan* the court stated that the Tucker Act is merely "jurisdictional," intimating that it does not effect a waiver of sovereign immunity. 424 U.S. at 398, 400. And in *Mitchell* the court repeated that the respondents "must look beyond the jurisdictional statute [the Tucker Act] for a waiver of sovereign immunity with respect

2. The decision of the Court of Claims cannot be reconciled with the foregoing principles.

a. None of the statutes from which the Court of Claims has inferred a right of action to recover damages against the United States for alleged mismanagement of Indian forest resources and their proceeds contains any "provision * * * that expressly makes the United States liable" on that account or that "grant[s] * * * [the] right of action * * * with specificity" (*United States* v. *Testan*, *supra*, 424 U.S. at 399-400). Indeed, nothing in the timber sale statutes (25 U.S.C. 406, 407, and 466), the road and right-of-way statutes (25 U.S.C. 318a and 323-325), or the interest statute (25 U.S.C. 162a) addresses in any respect the institution of litigation against the

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to their claims." 445 U.S. at 538. Technically, we think it more accurate to say that the Tucker Act itself effects a conditional waiver of the otherwise absolute immunity of the United States from being sued eo nomine. See, *e.g.*, *Army & Air Force Exchange Service* v. *Sheehan*, No. 80-1437 (June 1, 1982), slip op. 6; *United States* v. *Sherwood*, 312 U.S. 584, 590 (1941). The waiver is effective whenever an independent basis for recovery of damages exists, be it a contract, the government's retention of funds owned by the claimant (see 424 U.S. at 400) or another statute that creates a right of action in damages against the United States for breach of a statutory command (*ibid.*). But it cannot matter how the point is articulated. It is entirely clear that no recovery can be had under the Tucker Act in respect of a claim founded upon an Act of Congress unless the statute invoked, construed in the conservative manner appropriate to a waiver of sovereign immunity (see *United States* v. *Sherwood*, *supra*, 312 U.S. at 590-591), can be said to make the United States answerable in damages for the conduct of federal officials in violation of the particular statute. *United States* v. *Testan*, *supra*, 424 U.S. at 400. It goes without saying that any semantic reformulation would not call in question the fundamental reasoning, much less the result, of *Testan*, this Court's earlier *Mitchell* decision, or any other of this Court's decisions.

United States. Neither the respondents nor the Court of Claims has ever suggested otherwise.

Although the Court of Claims implicitly recognized that none of the statutes from which it extracted authority to award damages against the United States expressly provides for maintenance of such suits, it reasoned (Pet. App. 4a) that the necessary consent to suit may be inferred from a statute, such as those establishing schedules for payment of federal employees, that directs the government to pay a particular sum of money to a particular person or to members of a particular class. Although we know of no decision of this Court that embraces that sweeping proposition,[13] it may ordinarily be that a statute

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[13] In *Testan* the Court reserved this question in commenting upon *Selman* v. *United States*, 498 F.2d 1354 (Ct. Cl. 1974), which was decided on precisely this basis. The Court distinguished *Selman* (see page 23, *infra*) but expressly withheld judgment as to its soundness. 424 U.S. at 402.

We note, as well, that the Court of Claims has subtly, but significantly, altered the standard announced by this Court by declaring, in purported reliance on *Testan*, that in order to recover damages against the United States "it is * * * necessary * * * that the substantive right granted by Congress extend to entitlement to *compensation or money damages*" (Pet. App. 4a) (emphasis added). The standard announced by this Court, however, is that the statute invoked must "mandat[e] compensation for the damage sustained." *United States* v. *Testan*, *supra*, 424 U.S. at 402, quoting *Eastport Steamship Corp.* v. *United States*, 372 F.2d 1002, 1008-1009 (Ct. Cl. 1967). And most recently, in *Army & Air Force Exchange Service* v. *Sheehan*, *supra*, slip op. 13, the Court reaffirmed that an action for damages under the Tucker Act may not be premised upon "regulations[] which do not explicitly authorize damages awards." The difference is not purely semantic for, as we explain below (pages 21-22, *infra*), a statutory right to payment of money does not invariably create a remedy against the United States in the event of nonpayment. Whether it does turns upon the intent of Congress.

that "leave[s] no question" that refunds are to be made to particular claimants by an administrative officer, *United States* v. *Hvoslef*, 237 U.S. 1, 10 (1915), or that "creates [a] right to have repayment under * * * facts therein stated," *Medbury* v. *United States*, 173 U.S. 492, 497 (1899), can fairly be interpreted as mandating a damages remedy against the United States. And some support for that conclusion may be adduced from this Court's determination that the Fifth Amendment Just Compensation Clause imports a self-executing right to recover damages against the United States under that branch of the Tucker Act addressed to claims founded upon the Constitution for an uncompensated taking. See *Jacobs* v. *United States*, 290 U.S. 13, 16 (1933); compare *United States* v. *Testan*, *supra*, 424 U.S. at 401. Indeed, this principle receives recognition in the *Testan* Court's dictum that suit may be maintained against the United States for "money improperly exacted or retained" even when no statute expressly affords a right to recover damages. 424 U.S. at 401.

On the other hand, even when a statute creates a right to payment from the United States, the question remains ultimately whether Congress intended to create a damages remedy against the United States. See *United States* v. *Shaw*, 309 U.S. 495, 500, 502 (1940); *Munro* v. *United States*, 303 U.S. 36, 41 (1938). And the existence of a right to payment does not invariably connote congressional consent to maintenance of actions to recover damages. Rather, all indications of congressional intent, including the shape of the relevant statutory scheme as a whole, must be considered. For instance, a statute may expressly bar judicial review, including actions for damages. See, *e.g.*, 38 U.S.C. 211(a) (veterans' benefits); *Johnson* v. *Robison*, 415 U.S. 361 (1974);

Jennings v. *United States*, 214 Ct. Cl. 789, 790 (1977). In other cases a statutory scheme provides particular remedies, and the Court has inferred from the scheme an intent to deny an alternative remedy against the United States. See, *e.g.*, *Nichols* v. *United States*, 74 U.S. (7 Wall.) 122 (1868); see also *Medbury* v. *United States*, *supra*, 173 U.S. at 497-498; cf. *Middlesex County Sewerage Authority* v. *National Sea Clammers Association*, 453 U.S. 1, 14-15, 19-21 (1981).[14] Finally, even where no avenue for judicial redress for a particular denial of right is provided at all, the statutory scheme or legislative history may reflect a congressional determination to withhold a damages remedy against the United States, even though the right involved is, on its face, an absolute entitlement to payment of money. See, e.g., *United States* v. *Erika, Inc.*, No. 80-1594 (Apr. 20, 1982).[15]

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[14] As noted above, in *Medbury* the Court inferred a right to seek damages against the United States from a statute granting a specified class of individuals the right to receive a particular refund from the Secretary of Interior. At the same time, the Court noted that while an action could be maintained because the dispute as to the petitioner's entitlement (under the public land laws) was purely legal, no suit could have been maintained if the dispute was factual—the judgment of the Secretary of the Interior then being regarded as unreviewable. 173 U.S. at 497-498.

[15] To be sure, in *Erika* the Court stated that "find[ing] the language of the [applicable statute] dispositive, we do not reach [the government's] contention[] that * * * respondent has failed to show that the United States unequivocally has waived sovereign immunity." But under the *Testan* analysis (see pages 17-18, *supra*), the considerations that led the Court to conclude that Congress had "specifically precluded review in the Court of Claims of [the] determinations" there in issue (*United States* v. *Erika*, *supra*, slip op. 5) were plainly more than sufficient to establish the absence of the necessary "unequivocal[]" waiver of sovereign immunity.

b. Even if a statutory right to payment of money by the United States were invariably sufficient to ground an action for damages in the event of non-payment, that proposition is of no assistance to respondents, for, as the Court of Claims recognized, none of the statutes upon which they rely embodies any assurance of payment of money—at least not in the circumstances of this case. Accordingly, the Court of Claims extended its reasoning, explaining (Pet. App. 5a; footnotes omitted):

> Nor do we think that the only statutes mandating compensation are those which expressly authorize payment of the money sought * * *.

We are unaware of any authority for this novel extension of the government's consent to suit under the Tucker Act. Contrary to the Court of Claims' suggestion (*ibid.*), the proposed rule finds no support in *Testan* or in *Mitchell I*. The absence of a statute creating a right to compensation in the situation in question was the key to the Court's decision in *Testan*. And while withholding approval of the result in *Selman* v. *United States*, 498 F.2d 1354 (Ct. Cl. 1974), a case in which damages were awarded based upon such a statute, see page 20, note 13, *supra*, the Court distinguished *Selman* on precisely this basis. *United States* v. *Testan*, *supra*, 424 U.S. at 402-403. Similarly, the Court cited *Mosca* v. *United States*, 417 F.2d 1382 (Ct. Cl. 1969), as consistent with its holding (424 U.S. at 400), thereby endorsing the test employed in that case: whether the statute creates a "right to recover a certain sum." 417 F.2d at 1386. Accordingly, *Testan* directly contradicts the Court of Claims' reasoning.[16]

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[16] Similarly, nothing in *Mitchell I* establishes that a non-monetary duty may ground an action for damages. The Court

Contrary to the court below, although not dispositive, the monetary character of the statutory right is a strong indication that a statute may "in itself * * * can fairly be interpreted as mandating compensation * * * for the damage sustained." *United States* v. *Testan*, *supra*, 424 U.S. at 402, quoting *Eastport Steamship Corp.* v. *United States*, 372 F.2d 1002, 1008, 1009 (Ct. Cl. 1967). By contrast, where, as here, the duties imposed by a statute are not essentially monetary in character, but require implementation through conduct by federal officials, the contrary inference arises: that Congress, by its silence as to a damages remedy, created only a substantive right enforceable through injunctive relief. See *United States* v. *Testan*, *supra*, 424 U.S. at 403. As noted above, this distinction is reflected in *Testan* in the Court's recognition that where suit is maintained to require the United States to disgorge a claimant's "money improperly exacted or retained," the statutory predicate need not specify that a right of action for damages is created. 424 U.S. at 401.[17]

There is, moreover, good reason to treat differently cases where the right involved is not essentially

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intimated no view as to whether a statutory violation, even when it constitutes a breach of express statutory trust, would support an action for damages. 445 U.S. at 542. And the dissenting Justices' affirmative answer to that question (445 U.S. at 550) would not necessarily apply to an alleged statutory violation which does not implicate a trust affirmatively established by Congress.

[17] Plainly, the statute must nonetheless establish a right to payment or repayment so as to support the conclusion that the exaction or nonpayment is "wrongful." Only Congress may consent to suit against the United States; no court has that authority. *United States* v. *Shaw*, *supra*, 309 U.S. at 502.

monetary.[18] First, there is nothing in cases such as this to overcome the omnipresent "presumption" (*Eastern Transportation Co.* v. *United States*, 272 U.S. 675, 686 (1927)) that Congress has not consented to suit for money damages. Second, the task that would be entrusted to the courts would be far more difficult. Here, for example, the courts would be required to assess the entire course of government management of the resources here involved over a period of years.[19] And the special difficulties involved are not limited

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[18] Respondents' insistence (Br. in Opp. 7 n.7) that the government's obligation under the statutes at issue here is "essentially monetary in character" because the government's faithful performance of its duties would maximize revenue flowing to them, does not serve to distinguish *Testan*, for the same could readily have been said respecting the government's alleged noncompliance with the Classification Act in that case. See 424 U.S. at 398-405.

[19] This case had already been in litigation for six years when the United States moved to dismiss on sovereign immunity grounds. Proceedings to that juncture included elaborate discovery and the first phase of a projected multipart trial. See Respondents' Br. in Opp. 3 n.4, No. 78-1756 (1979); Br. for Respondents 7-8, No. 78-1756 (1979).

Regrettable though it may be, the extent of the proceedings undertaken prior to the government's motion to dismiss can have no bearing on the decision of this case. First, it is settled that no attorney for the government has authority to waive the government's immunity from suit. *Munro* v. *United States*, *supra*, 303 U.S. at 41; *Finn* v. *United States*, 123 U.S. 227, 233 (1887). Second, the filing of the motion to dismiss followed soon after this Court's decision in *Testan*. Although we do not believe *Testan* effected any change in the governing principles (see pages 18-19, note 12, *supra*), it restated them in a manner that made plain their application to this case. Finally, as a practical matter, the judicial proceedings that remain to be completed should trial go forward are substantially more extensive than those now gone before.

to the discovery, production, marshalling, presentation and evaluation of elaborate historical and technical evidence. More significantly perhaps, given the strictness with which waivers of sovereign immunity are to be construed, *United States* v. *Sherwood*, 312 U.S. 584, 590-591 (1941), where the statute upon which liability is premised creates no right to payment of a sum certain, the courts would be obliged to determine the extent of liability, if any, and the items of damages that are cognizable, without any legislative guidance. This task, unlike the factual or legal determination whether a particular individual falls within a class granted a right to payment of money by a statute, is not one to which courts are adapted. One need not condemn as inherently unreasonable the guidelines established by the court below respecting the cognizability of various items of damages that might be sought (Pet. App. 10a-11a, 17a-18a) to recognize the anomalous nature of the exercise itself; the rules established are of "judicial cloth, not legislative cloth" (*Weinberger* v. *Catholic Action of Hawaii*, 454 U.S. 139 (1981)).[20]

c. The foregoing principles, which, in our submission govern the interpretation of the statutes that the Court of Claims relied upon in subjecting the United

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[20] As explained in our petition in the companion case, *United States* v. *Duncan*, No. 81-1747, which the Court appears to be holding for possible disposition in light of a decision herein, the Court of Claims' decision there runs afoul of fundamental principles of proximate causation because of the court's failure to define precisely the violation of law to be redressed (see 81-1747 Pet. 23-24). That failure was made possible by the fact that the statute from which a right to damages was inferred created no right to specified compensation at all, and thus left the court essentially at large in determining the scope of liability. A copy of our petition in *Duncan* has been provided to respondents.

States to liability for damages, are supported by an independent line of authority as well: this Court's recent decisions that, absent special circumstances, refuse to imply a private right of action from federal statutes that do not explicitly provide for the same.[21] Those cases are instructive in this context, for here, too, the "ultimate question is one of congressional intent, not one of whether this Court thinks it can improve upon the statutory scheme that Congress enacted into law" (*Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 578 (1979)). As the Court recognized in *Testan*, *supra*, 424 U.S. at 400, courts are not free to dispense with "established principles" requiring explicit congressional authorization for maintenance of suits against the United States simply "because it might be thought that they should be responsive to a particular conception of enlightened governmental policy." See also *United States* v. *Shaw*, *supra*, 309 U.S. at 502.

The decision of the Court of Claims is inconsistent with these authorities, for that court did not purport to adduce "any evidence that Congress anticipated that there would be a private remedy." *California* v. *Sierra Club*, 451 U.S. 287, 298 (1981).[22] On the

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[21] See *Middlesex County Sewerage Authority* v. *National Sea Clammers Association*, 453 U.S. 1, 13-18 (1981); *Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, 451 U.S. 630, 639-640 (1981); *California* v. *Sierra Club*, 451 U.S. 287, 292-298 (1981); *Northwest Airlines, Inc.* v. *Transport Workers*, 451 U.S. 77, 91-95 (1981); *Universities Research Association* v. *Contu*, 450 U.S. 754, 770-784 (1981); *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 19-24 (1979); *Touche Ross & Co.* v. *Redington*, 442 U.S. 560 (1979); see also *Jackson Transit Authority* v. *Transit Union*, No. 81-411 (June 7, 1982), slip op. 5-6.

[22] Indeed, implication of a damages remedy against the United States from a statute silent on that subject is partic-

contrary, as Judge Nichols persuasively argued in dissent, the right of action implied by the court below "is in * * * reality but a strong and clear wish on the judge's part" (Pet. App. 25a). Rather than pointing to any relevant evidence respecting congressional intent, the basis for the Court of Claims' decision was the court's conclusion (Pet. App. 15 & n.12) that the availability of injunctive relief (see pages 39-41, 44, *infra*) was insufficient to vindicate the statutory rights of the respondents. This is precisely the kind of legislative policy judgment that this Court has recognized to be beyond the province of the courts.[23]

3. The result reached by the Court of Claims is inconsistent with the fundamental sovereign immunity principles rehearsed above, for none of the statutes from which the Court of Claims inferred a right to

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ularly to be disfavored, because congressional intent must be determined against the background of the "presumption" that the United States has not consented to suit. *Eastern Transportation Co.* v. *United States*, 272 U.S. 675, 686 (1927).

[23] In *Universities Research Association* v. *Contu*, *supra*, the Court held that the Davis-Bacon Act does not confer a private right of action for back wages under a contract that administratively has been determined not to call for work subject to that Act. The Court reserved the distinct question whether the Act creates an implied right of action to enforce a contract that contains specific Davis-Bacon Act stipulations. 450 U.S. at 769 & n.19. Key considerations cited by the court in support of its holding—the indeterminancy of costs for contractors, as well as for the government, that would result from availability of a private right of action where the contract has not been determined administratively to be subject to the Davis-Bacon Act (see 450 U.S. at 776-777, 782-783)—support, by analogy, the distinction we have noted (see pages 20-22, *supra*) between statutes imposing monetary obligations upon the United States, and those imposing other kinds of duties.

hold the United States accountable in damages provides the necessary "unequivocally expressed" consent to suit against the United States.

a. Nothing in the timber sale and management statutes, 25 U.S. 406, 407 and 466, contains the needed authorization. As originally adopted, the timber sale statute for allotted lands, 25 U.S.C. 406 (1958 ed.), enacted as Section 8 of the Act of June 25, 1910, ch. 431, 36 Stat. 857, provided only a bare authorization for sale of timber on allotted Indian lands, by the allottee, subject to the consent of the Secretary (see page 3, note 3, *supra*). Similarly, Section 7 of the Act of June 25, 1910, ch. 431, 36 Stat. 857, the forerunner to the present 25 U.S.C. 407, provided only that

> the mature living and dead and down timber on unalloted lands of any Indian reservation may be sold under regulations to be prescribed by the Secretary of the Interior, and the proceeds from such sales shall be used for the benefit of the Indians of the reservation in such manner as he may direct * * *.

Plainly, nothing in these provisions expressly consents to maintenance of suits against the United States for recovery of damages incurred through improvident federal management on Indian timber lands.

On the contrary, the Act of 1910 does not even reflect any congressional expectation that the Secretary would play an active role in timber management at all. This is especially true in the case of allotted lands, where the statute authorized sale "by the allottee." Section 8, 36 Stat. 857. The Secretary's conduct under Sections 7 and 8 of the 1910 Act was thus unconstrained by any congressional directive. Accordingly, it is difficult indeed to suppose that Con-

gress intended that the United States be held liable for failure to meet any such standard. The only monetary obligation imposed upon the Secretary by the 1910 Act was to pay the actual "proceeds" of timber sales to the allottee.[24] Thus, while it may well be that Section 7 or 8 of the 1910 Act would ground an action to compel the Secretary to disgorge unlawfully retained proceeds (see *United States* v. *Testan*, *supra*, 424 U.S. at 401 ("money wrongfully exacted or retained")), no statutory basis was created for extending that remedy to proceeds that arguably or ideally should have been, but were not, captured by the Secretary. On the contrary, the explicit statutory recognition of a right to receive the "proceeds" of sales conducted (but see note 24, *supra*), suggests that this is the limit of any damages action implicitly authorized by Congress. See *United States* v. *Erika*, *supra*, slip op. 5-7; *Middlesex County Sewerage Authority* v. *National Sea Clammers Association*, *supra*, 453 U.S. at 14-15, 19-21.

Nor is there any indication in the legislative history of the Act of June 25, 1910, that Congress intended to consent to suit for mismanagement of Indian timber resources by enacting these provisions. Rather, as the Court observed in *Mitchell I* (445 U.S. at 545-546), the purpose of enactment of Sections 7 and 8 was simply to supply authority—theretofore lacking—for sale of timber on Indian lands, both

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[24] This obligation, moreover, would arise only in the event—not necessarily contemplated by Congress—that the Secretary, rather than the allottee, conducted the sale. We note, as well, that both Sections 7 and 8 of the 1910 Act contemplated an alternative to payment to the Indian allottee or tribe—use of the proceeds of sales for the benefit of the Indians, in whatever manner the Secretary might determine to be warranted. See 36 Stat. 857.

allotted and unallotted. This limited purpose is reflected in the pertinent legislative history, which explains that legislation was needed to fill a statutory vacuum that prevented sale of Indian timber. See H.R. Rep. No. 1135, 61st Cong., 2d Sess. 3 (1910) (discussing Sections 8 and 9 of H.R. 24992).[25] And

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[25] The House debates reflected this understanding as well. See 45 Cong. Rec. 6085-6088 (1910). The Secretary of the Interior's explanation of the purpose of the bill was read to the House during the debate to explain the purpose of Sections 8 and 9 of H.R. 24992, 61st Cong., 2d Sess. (1910), which, with minor modifications, became Sections 7 and 8 of the Act. 45 Cong. Rec. 6086 (1910) (remarks of Rep. Burke). Representative Miller, speaking in favor of the bill, explained (*ibid.*): "this proposed law * * * simply permits the cutting of * * * timber under proper regulations by the Secretary of the Interior."

The debates do reflect some concern as to whether the Secretary's subordinates possessed the necessary expertise to determine which timber should be cut (45 Cong. Rec. 6086-6088 (1910) (colloquy of Representatives Mann, Burke, Kiefer and Saunders)), but there is no suggestion that monetary liability for the government could result from mismanagement. The legislative response to concerns about the competence of the Indian Service was adoption of an amendment dividing supervisory authority under Sections 8 and 9 of the bill between the Secretary of the Interior, and the Secretary of Agriculture (*id.* at 6087-6088). Addressing the amendment, Representative Kiefer observed (*id.* at 6088): "[T]his amendment only turns the matter over to [the Department of Agriculture] without any provision as to how it shall be administered."

Without providing any explanation of its action, the Senate Committee reported out a bill that lacked any counterpart to Sections 8 and 9 of the House bill. See S. Rep. No. 868, 61st Cong., 2d Sess. (1910); the Senate passed the amended bill without any relevant debate. See 45 Cong. Rec. 8723-8727 (1910). The Conference Report explains that the language agreed upon by the conferees carried forward provisions of the House bill, including Sections 8 and 9, which ap-

it is especially improbable that Congress intended to consent to monetary liability for forestry mismanagement on allotted lands, because, at the time in question, it was widely believed that heavily forested lands were not to be allotted. See page 3, note 2, *supra*.

Insofar as Congress contemplated systematic cutting of heavily forested allotted lands, the intended purpose was simply to make those lands available for cultivation. See 45 Cong. Rec. 6088 (1910) (remarks of Rep. Burke) ("[T]here are portions of the country where it would be very much better to cut the timber off and let it become cultivated land, rather than to let the timber remain.")[26] In short, an ongoing forestry management program was not within the contemplation of the Sixty-first Congress. It can hardly be assumed, accordingly, that Congress subjected the United States to liability in damages for mismanagement of such a program.

To be sure, in 1964, the timber sale statutes were amended, assuming their present form, so as to direct the Secretary to adhere to principles of sustained-yield management on tribal lands, to permit the deduction of administrative fees by the Secretary from the proceeds of timber sales, and to prescribe a generalized standard to guide the Secretary in determining whether to authorize sale of timber on allotted

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peared, with minor changes, as Sections 7 and 8 of the Act. H.R. Rep. No. 1727, 61st Cong., 2d Sess. 3 (1910); see also 45 Cong. Rec. 8897-8901 (1910); *id.* at 8982 (statement by House managers). The Conference Committee eliminated the House floor amendment vesting regulatory authority in the Secretary of Agriculture, but provided no explanation for that action.

[26] Indeed this was the rationale of the Court's decision in *United States* v. *Payne*, 264 U.S. 446, 449 (1924), which compelled the United States to allot the forested lands of the Quinault Reservation (see page 3, note 2, *supra*).

lands (see page 4, note 4, *supra*). Pub. L. No. 88-301, 78 Stat. 186-187. But the Secretary retained substantial discretion respecting timber sales on Indian lands. Significantly, no provision of the amended statute provides any right to recover damages or compensation of any kind—except for the direction either to pay the proceeds of sale to the owner of an allotment or to expend them for the benefit of the individual allottee or the members of the tribe concerned, as appropriate. 25 U.S.C. 406(a), 407. Accordingly, while the amended timber sale statutes may have created duties enforceable against the Secretary in equity (see pages 39-41, 44-45, *infra*), there is no indication that Congress thereby consented to recovery of damages for any mismanagement that might occur.[27]

Nor does the legislative history of the 1964 Amendments to the timber sale statutes supply the necessary evidence of congressional intent. On the contrary, the bill was enacted at the request of the Interior Department to address a variety of technical matters, to expressly authorize deduction of administration fees, to provide greater flexibility to the Secretary in sales of tribal timber, and to provide a standard to guide the Secretary respecting whether timber should be sold on allotted land. S. Rep. No. 672, 88th Cong., 1st Sess. 2 (1963); H.R. Rep. No. 1292, 88th Cong., 2d Sess. 1-2 (1964). The House Report states that "[n]o additional expenditure of Federal funds" was expected to be incurred by reason of the enactment of the legislation. H.R. Rep. No. 1292, *supra*, 2.

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[27] Because the 1964 amendment provided for deduction of administrative fees from timber sale proceeds "to the extent permissible under [25 U.S.C. 413]," we assume that an action to recover unlawfully high administrative fees may be maintained against the United States as one seeking recovery of "money improperly exacted or retained." *United States* v. *Testan*, *supra*, 424 U.S. at 401.

There is no suggestion whatever that the government was to be subjected to monetary liability.[28]

The respondents and the Court of Claims (Pet. App. 13a-15a) rely finally upon 25 U.S.C. 466, enacted as Section 6 of the Indian Reorganization Act of 1934, ch. 576, 48 Stat. 986, to support imposition of monetary liability upon the United States for the Secretary's alleged mismanagement of the forest resources of the allotted lands of the Quinault Reservation. But Section 466 merely requires the Secretary to "make rules and regulations for the operation and management of Indian forestry units on the principle of sustained-yield management."[29] Here again, as the Court of Claims recognized (Pet. App. 14a), there simply is no statutory directive to pay compensation. Rather, the duty imposed upon the Secretary was simply to adopt appropriate regulations, by which he would, of course, be bound (see pages 39-41, 44-45, *infra*).

Once again the legislative history is devoid of any suggestion that the United States is to be accountable in damages for any failure to comply with the statutory mandate. See, *e.g.*, S. Rep. No. 1080, 73d Cong., 2d Sess. (1934); 78 Cong. Rec. 11123-11139 (1934) (Senate debate), *id.* at 11724-11744 (House debate). Moreover, the congressional design reflected in the Indian Reorganization Act is incompatible with any suggestion that Congress intended to create

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[28] A letter from the Interior Department to the Congress urging enactment of the legislation explained that the standards for timber sales on allotted lands "should help allay disputes and avoid misunderstanding." H.R. Rep. No. 1292, *supra*, at 3; S. Rep. No. 672, *supra*, at 3. The possibility of litigation was not mentioned.

[29] It is not clear from the face of the statute whether it has any application to forestry practices on individual allotments.

damage liability for federal mismanagement of Indian natural resources. Rather than fostering such dependency, the congressional objective was to encourage Indian self-government and Indian control over exploitation of Indian natural resources—including timber. See, *e.g.*, 78 Cong. Rec. 11123-11124 (1934) (remarks of Sen. Wheeler). Representative Howard, sponsor of the legislation along with Senator Wheeler, stated (*id.* at 11730): "The ultimate goal * * * is complete Indian operation of the entire Indian forest enterprise * * *." See also *id.* at 11732 (remarks of Rep. Howard). Thus Congress had no expectation that the government was embarking upon a program of comprehensive management control that carried with it monetary liability for mismanagement of Indian forest resources.[30]

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[30] To be sure, as respondents have observed (Br. in Opp. 9), Representative Howard explained (78 Cong. 11730 (1934)) that the bill would make "mandatory" use of appropriate management standards for Indian forest lands. But there is no suggestion that this mandate was directed against mismanagement by the Secretary's subordinates as opposed to improvident practices by the Indians themselves. See, *e.g.*, *United States* v. *Eastman*, 118 F.2d 421 (9th Cir.), cert. denied, 314 U.S. 635 (1941), wherein Quinault Reservation allottees challenged the Secretary's authority, under Sections 7 and 8 of the Act of June 25, 1910, to impose restrictions upon clear-cutting (see page 40, note 34, *infra*). Cf. *Naganab* v. *Hitchcock*, 202 U.S. 473 (1906). In any event, while the mandatory character of the Secretary's duty may suffice to render injunctive relief available, there is no indication that Congress expected the United States to be answerable in damages.

The testimony of Commissioner of Indian Affairs Collier, cited by respondents (Br. in Opp. 9-10), concerning the claims of the Menominee Indians arising from the government's failure to adhere to sustained-yield principles does not indicate otherwise. As respondents observe (Br. in Opp. 10 n.12),

b. The road building and rights-of-way statutes relied upon by the Court of Claims (Pet. App. 15a-16a) to infer a right of action to recover damages from the United States for failure to plan and build an optimal road network, to properly maintain rights of way, and to secure full value for rights of way granted, do not support the court's holding. Section 318a of Title 25 merely *authorized* appropriations for building of roads on Indian reservations. It cannot be inferred from the bare statutory language

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the Menominees ultimately prevailed upon their claim. *Menominee Tribe* v. *United States*, 117 Ct. Cl. 442 (1950). Respondents omit to mention, however, that the Menominees recovered based upon a special jurisdictional act, the Act of Sept. 3, 1935, ch. 839, 49 Stat. 1085, as amended, ch. 120, 52 Stat. 208, that expressly conferred jurisdiction upon the Court of Claims to "render final judgment" on enumerated claims, including the violation of a statute (35 Stat. 51) requiring sustained-yield forestry practices on the Menominee lands. The special jurisdictional act further provided that "At the trial of [any suit instituted hereunder] the court shall apply as respects the United States the same principles of law as would be applied to an ordinary fiduciary." And the Court of Claims' suggestion (Pet. App. 15a) that its authority to render judgment in *Menominee Tribe* did not necessarily rest upon the special jurisdictional act is not supported by the pertinent portion of that court's opinion in *Menominee Tribe* (see 117 Ct. Cl. at 501). *A fortiori*, Commissioner Collier's remarks do not reflect any intent on the part of the Seventy-third Congress that the United States be liable in damages for forest mismanagement. Indeed, the Indian Reorganization Act provides that none of its provisions "shall be construed to impair or prejudice any claim or suit of any Indian tribe against the United States." Section 15, 25 U.S.C. 475. It is unlikely that Congress, so meticulous in preserving Indian claims, intended to create a new class of claims by enacting Section 6 of the Indian Reorganization Act, but did not bother to express that intent in any fashion.

that a right to recover such funds in damages is created.

Sections 323 through 325 empower the Secretary to grant rights-of-way over tribal and individual lands (25 U.S.C. 323) subject, in most cases, to the owner's consent (25 U.S.C. 324) and to the requirement that there be paid to the Secretary "such compensation as the Secretary * * * shall determine to be just," with the proceeds to be disposed of under the Secretary's regulations (25 U.S.C. 325). We assume that the latter provision would ground an action to recover proceeds of a right-of-way sale wrongfully withheld from the Indians over whose lands it was granted. It does not follow, however, that damages for failure to secure more generous compensation are available. Indeed, the explicit statutory recognition of the Secretary's authority to determine the amount of compensation militates powerfully against the damages remedy for insufficient compensation created by the Court of Claims. And there is even less basis for inferring from those statutes, as did the Court of Claims, a right to recover damages for the Secretary's alleged failure to plan and build an optimal road network, or properly to maintain rights of way (see Pet. App. 15a-16a). Such claims simply are not germane to any duty imposed by the pertinent statutes.[31]

The legislative history of the Act of Feb. 5, 1948, 62 Stat. 17, the source of 25 U.S.C. 323-325, reveals

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[31] Like claims for excessive administration fees, respondents' claim for deduction of road building fees may be maintainable on the theory that recovery of funds unlawfully retained is sought. Nothing in 25 U.S.C. 318a or Sections 323-325, however, supports a claim that road building charges are per se unlawful, and we are unaware of any other basis for holding road building charges unlawful.

that the only purposes of the legislation were to codify a uniform set of rules governing the granting of rights of way applicable to all Indian lands and all kinds of rights of way, to extend the Secretary's authority to include rights of way across individual allotments, and to vest the Secretary with authority to grant rights of way without the consent of every individual owner in certain cases where it would be impractical to secure such consent. S. Rep. No. 823, 80th Cong., 2d Sess. 3-4 (1948) (reproducing report of Interior Under Secretary Chapman).

c. Finally, there is no statutory basis for the Court of Claims' implication of a right to recover damages for payment of a less than optimal interest rate. Rather than compelling a particular level of compensation, the statute upon which respondents rely, 25 U.S.C. 162a, affords the Secretary substantial discretion respecting the investments to be made with individual Indian funds. Because the funds involved here are maintained on behalf of individual allottees, rather than Indian tribes, 25 U.S.C. 161a, which specifies payment of a 4% interest rate on tribal trust funds held in the Treasury, is inapplicable. Thus there is nothing in the statute that requires payment of a particular rate of interest. *A fortiori* Congress has not consented to render the United States accountable in damages for any amount by which the revenues earned fall short of a standard of "reasonable management zeal to get for the Indians the best rate" (Pet. App. 20a). Accordingly, while failure to apply to the respondents' account interest monies actually earned would likely give rise to a right to redress in damages on the theory that respondents' fund had been "wrongfully retained," the

statute supplies no basis for recovery of damages upon respondents' quite different claim.[32]

4. As we have shown, "[n]othing on the face" of any of the statutes at issue (*Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 59 (1978)) can "fairly be interpreted as mandating compensation" for the conduct alleged by respondents, as *Testan* requires. The statutes involved here, to be sure, or at least some of them, create substantive duties that the Secretary must fulfill. But this could equally be said of the Classification Act, considered in *Testan*, which unambiguously requires that pay classification ratings of federal employees be carried out pursuant to the principle of "equal pay for substantially equal work" (5 U.S.C. 5101(1)(A)). Although *Testan* alleged a violation of the Act, the Court concluded that a back pay remedy was unavailable, rejecting the notion that the substantive right necessarily imparts a damages remedy. 424 U.S. at 400-403. The Court of Claims' conclusion in the instant case, however, like its *Mitchell I* decision (see page 6, *supra*), rests largely upon the court's view that an injunctive remedy is inadequate to redress the violations alleged (Pet. App. 12a-13a)—precisely the inference deemed inadmissible in *Testan*.

Moreover, here, as in *Testan*, *supra*, 424 U.S. at 403:

> [t]he situation * * * is not that Congress has left the respondents remediless, * * * but that

[32] The evident purpose of Section 162a is to provide the Secretary with authority to put Indian funds to uses more remunerative than the 4% rate prescribed by 25 U.S.C. 161a. It also provides authority for investment of individual Indian funds. But Congress has enacted no general requirement that individual Indians be paid any particular rate upon proceeds of timber sales held by the Secretary. This "oversight"—if such it was—may not be remedied by judicial legislation.

> Congress has not made available * * * the remedy of money damages * * *.

Respondents are not wholly without recourse against what they take to be violations of the various management statutes upon which they rely. Rather, violations of duties imposed by the various statutes in issue may be cured by actions for declaratory, injunctive or mandamus relief against the Secretary. 5 U.S.C. 702, 706; 28 U.S.C. 1331(a), 1361. In *Naganab* v. *Hitchcock*, 202 U.S. 473, 475 (1906), it is true, the Court dismissed an action by Indians to enjoin the Secretary from implementing regulations prohibiting certain exploitative forestry practices on particular Indian lands, on the theory that the action was in reality an unconsented "suit against the United States to control the disposition of lands [to which the United States holds title] and for an account of the proceeds" of the sale of certain former Indian lands conveyed to the United States for resale. The authority of that case, however, has been eroded by subsequent decisions of this Court, and by the enactment of legislation, including the Administrative Procedure Act in 1948.[33] While it may not now be possible to redress injuries occurring long ago by injunctive relief, the fact remains that the respondents were not powerless to protect themselves from the wrongs alleged.[34]

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[33] In any event, in the typical case, the retrospective reach of a damages remedy would also be limited—by the six year statute of limitations. 28 U.S.C. 2501.

[34] Even before enactment of the Administrative Procedure Act, it may have been possible to secure equitable relief against the Secretary or his subordinates. See, *e.g.*, *United States* v. *Eastman*, *supra*. Ironically, there a group of Quinault Reservation allottees sought to enjoin enforcement of the Secretary's regulations restricting clear cutting and

Even if complete redress through an action for declaratory or injunctive relief was not available, the Court of Claims' analysis could not stand. It is the ordinary result of sovereign immunity that unconsented claims for money damages are barred. The fact that such damages cannot be recovered without the sovereign's consent does not support the conclusion that consent has been given. If the Court of Claims were correct in concluding that a remedy in damages must be implied whenever the remedy is necessary to redress injury already sustained, the doctrine of sovereign immunity would be robbed of all effect. Moreover, "many of the federal statutes * * * that expressly provide money damages as a remedy against the United States in carefully limited circumstances would be rendered superfluous." *United States* v. *Testan*, *supra*, 424 U.S. at 404.

B. The Special Status of Respondents as Indians Does Not Give Rise to a Right to Damages Against the United States in the Absence of Statutory Authority for Such Recovery

1. The Court of Claims did not purport to rest its decision upon an analysis, such as that under-

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requiring adherence to sustained yield practices, arguing the Secretary was required to maximize revenue to them in the short run. The court of appeals held that the regulations were within the Secretary's authority. 118 F.2d at 424-425. Moreover, contrary to respondents' suggestion (Br. in Opp. 13), their "predecessors" were not "rebuffed [in their pursuit of injunctive relief] for lack of the United States' consent to be sued." While the court of appeals held, 118 F.2d at 423, that the United States was to be dismissed as a defendant because of lack of consent to suit—a ruling that would not be required today, see 5 U.S.C. 702—the court proceeded to adjudicate the claim for injunctive relief on its merits, as against the federal officials joined as defendants. See 118 F.2d at 424-425.

taken above, of the language and the legislative history of the statutes held to give rise to monetary liability. Instead, as explained above (pages 8-9, *supra*), the court first determined that the statutes involved created or recognized fiduciary duties (Pet. App. 8a-9a). The court proceeded to reason that because a private express trust normally imports a right to recover damages for breach, and because injunctive relief was perceived to be an inadequate remedy in this case, Congress necessarily must have authorized recovery of damages for imperfect performance of the statutory duties (*id.* at 9a-10a, 11a-15a). Significantly, no evidence of an intention on Congress' part to accomplish that result was cited, nor was such evidence deemed necessary or relevant.

The Court of Claims' analysis departs from that prescribed by this Court in *Testan* in other respects as well. In determining that the statutes at issue create fiduciary duties, notwithstanding the absence of any language expressly creating a trust, the court relied upon the principle, announced in its own earlier decisions, that (Pet. App. 8a, quoting *Navajo Tribe of Indians* v. *United States*, 624 F.2d 981, 987 (Ct. Cl. 1980)):

> [W]here the Federal Government takes on or has control or supervision over tribal monies or properties the fiduciary relationship normally exists with respect to such monies or properties (unless Congress has provided otherwise) even though nothing is said expressly in the authorizing or underlying statute (or other fundamental document) about a trust fund, or a trust or fiduciary connection.

This proposition might well be unremarkable, were it not for the fact that, in the setting of this case, the fiduciary duties so "discovered" are employed as a

springboard that renders irrelevant evidence respecting Congress' actual intentions respecting the accountability of the United States in damages for violations of the pertinent statutes. In this context, it is especially improper to infer, as has the Court of Claims, a trust *giving rise to monetary liabilities* in the absence of any affirmative indication that Congress has consented to recovery of money damages. The Court of Claims has thus effectively reversed the "presumption" (*Eastern Transportation Co.* v. *United States*, *supra*, 272 U.S. at 686) that absent "affirmative statutory authority" (*United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 513-514 (1940)) the United States has not consented to be sued, substituting a contrary presumption, applicable to the United States' conduct in Indian affairs, that the United States has consented to be sued for statutory violations and other departures from the rules that govern private fiduciaries.[35]

2. Contrary to the Court of Claims' assumption, the fact that respondents are Indians does not alter the analysis through which it is determined whether damages may be recovered against the United States for statutory violations. So far as the availability of money damages is concerned, Indians are situated no differently than any other claimant against the United

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[35] The operation of this presumption is reflected most clearly in the companion case, *United States* v. *Duncan*, No. 81-1747 (see page 26, note 20, *supra*). There the Court of Claims reasoned that legislative recognition of "a general trust relationship as to the property of the Robinson Rancheria grounds compensation for breach of that trust," explaining that its decision in this case stood for that proposition, and remarking that "[n]either the particular statutes nor the history of Interior's [conduct at issue in *Duncan*] signifies any other result" (81-1747 Pet. App. 14a).

States—except as special legislation expressly provides for monetary awards.

a. It has long been established that the relationship between the United States and the Indian tribes is a special one, variously described by this Court as a "fiduciary," "guardianship" or "trust" relationship. See, *e.g.*, *United States* v. *Mason*, 412 U.S. 391, 398 (1973); *Seminole Nation* v. *United States*, 316 U.S. 286, 296-297 (1942); *Minnesota* v. *United States*, 305 U.S. 382, 386 (1939); *United States* v. *Shoshone Tribe*, 304 U.S. 111, 117-118 (1938); *United States* v. *Candelaria*, 271 U.S. 432, 442 (1926); *McKay* v. *Kalyton*, 204 U.S. 458, 469 (1907); *Minnesota* v. *Hitchcock*, 185 U.S. 373, 396 (1902); *United States* v. *Kagama*, 118 U.S. 375, 382-384 (1886); *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831). We fully accept the implications of that special relationship and the obligations that go with it. Nor do we deny that these duties may be invoked to flesh out the skeletal mandate of various statutes that authorize the Secretary to act in Indian affairs, providing, in appropriate cases, the "law to apply" (*Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 410 (1971); compare 5 U.S.C. 701(a)(2)) in actions for declaratory or injunctive relief from administrative action. But it simply does not follow that every such Act of Congress constitutes the "affirmative statutory authority" necessary to maintain an action for damages against the United States. *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 514 (1940); see also *United States* v. *Shaw*, 309 U.S. 495, 500, 502 (1940); *Munro* v. *United States*, 303 U.S. 36, 41 (1938).

On the contrary, the requirement of unequivocal congressional consent to suit against the United

States is fully applicable to Indian claimants. See, *e.g.*, *Klamath Indians* v. *United States*, 296 U.S. 244, 250, 255 (1935); *Blackfeather* v. *United States*, 190 U.S. 368, 376 (1903). In each case, the question is whether the particular statute invoked "in itself * * * can fairly be interpreted as mandating compensation." *United States* v. *Testan*, *supra*, 424 U.S. at 400, quoting *Eastport Steamship Corp.* v. *United States*, *supra*, 372 F.2d at 1009.[36]

b. In its decision in *Mitchell I* the Court of Claims disavowed reliance upon "unanchored judge-created principles of fiduciary law" (591 F.2d at 1302), rely-

[36] We do not suggest that an express declaration of trust embodied in a statute, or even, perhaps, in pertinent legislative history, is without bearing in this inquiry. Rather, such an explicit declaration of trust is simply to be considered along with all other evidence of legislative intent, including, most importantly, the language of the statute itself, in determining whether Congress has made the United States accountable in money damages for a statutory violation. That there may be occasions where an express declaration of trust evidences such an intention is irrelevant in the setting of this case, however, for there is no such declaration of trust, and the Court of Claims did not suggest otherwise. Nor, as we explain above (pages 28-39, *supra*), is there any other credible indication that Congress intended to subject the United States to suit for damages for violation of the pertinent statutes.

To be sure, there is some suggestion in the opinion of the Court of Claims that the statutes upon which that court relied in finding congressional consent to the award of damages "broadened the special trust," which this Court held in *Mitchell I* was imposed by the General Allotment Act, "to create a general fiduciary obligation on the Government in the management and operation of the forest lands with which Interior was entrusted" (Pet. App. 9a). But this rhetorical formulation cannot alter the result in this case, for there is no evidence either in the language or legislative history of any of the statutes involved that this was Congress' intention. *A fortiori*, there is no indication that Congress intended to make available a damages action for failure to honor the "trust" thus "expanded."

ing instead upon the specific provisions of Section 5 of the General Allotment Act to supply the needed consent to recovery of damages (see pages 5-6, *supra*). This Court accordingly declined to consider whether "the special relationship between the United States and Indian tribes establishes a right to money damages for timber mismanagement." 445 U.S. at 546 n.7. Here again, the decision below purports to premise liability on alleged violations of more or less particularized *statutory* duties. In a sense then, the question whether the United States is accountable in damages for any breach of an extra-statutory duty incurred as "guardian" or "trustee" of Indian property interests is not directly presented here. On the other hand, as we explain above (pages 41-43, *supra*), the finding of statutory consent to suit rests upon little, if anything, more than a presumption that the United States acts as a trustee in Indian matters generally, coupled with a further presumption that when it does so it is liable for damages for breach of trust. It is accordingly appropriate to consider here whether the special relationship between the United States and Indian tribes in itself somehow reflects or embodies the government's consent to be held answerable in damages for violation of fiduciary standards.[37]

This Court's cases do not establish any such rule. Instead, the Court has invoked the fiduciary relation only (1) to preclude unauthorized state interference in the relations between the United States and the Indian tribes or other unauthorized exercise of state jurisdiction on Indian lands (see, *e.g.*, *Cherokee Nation* v. *Georgia*, *supra*, 30 U.S. (5 Pet.) at 17;

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[37] Moreover, if the question were to be answered in the affirmative, there might be no need to consider whether the various statutes upon which the Court of Claims relied grant respondents a right of action to recover damages against the United States.

United States v. *Kagama*, *supra*, 118 U.S. at 382-384), (2) to bar or nullify exercises of state court jurisdiction in matters affecting Indian property rights, in which the United States was not properly joined or represented (see, *e.g.*, *Minnesota* v. *United States*, *supra*, 305 U.S. at 386; *United States* v. *Candelaria*, *supra*, 271 U.S. at 442; *McKay* v. *Kalyton*, *supra*, 204 U.S. at 469), (3) to interpret doubtful or ambiguous treaty language in favor of the Indians (see, *e.g.*, *United States* v. *Shoshone Tribe*, *supra*, 304 U.S. at 117-118; *Minnesota* v. *Hitchcock*, *supra*, 185 U.S. at 396), (4) to limit the United States' liability for damages under the Just Compensation Clause where, acting as a fiduciary manager, it has converted the form of Indian property (compare *Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1903), with *United States* v. *Sioux Nation of Indians*, 448 U.S. 371 (1980)), and finally (5) to emphasize the high standard of care that the United States is obliged to exercise in carrying out its duties respecting the Indians (see, *e.g.*, *United States* v. *Mason*, *supra*, 412 U.S. at 398; *Seminole Nation* v. *United States*, *supra*, 316 U.S. at 296-297).[38]

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[38] To be sure, the last two cited decisions involved claims for money damages, but no argument was made in either case that damages were unavailable as a remedy and the Court did not address that question in either case. In any event, *Seminole Nation* was maintained pursuant to special jurisdictional acts that provided the necessary consent to suit. 316 U.S. at 288-289 & n.2; see also *Seminole Nation* v. *United States*, 299 U.S. 417, 419 (1937). Moreover, the Court's discussion of the government's fiduciary duty in *Seminole Nation* (316 U.S. at 296-297) referred to a claim to compel payments expressly prescribed by Treaty, as to which no special jurisdiction provision would today be necessary.

In *United States* v. *Mason*, the United States did not assert that damages were an unavailable remedy, but only that its

Thus there is no basis whatever for concluding that Congress, merely by directing the Secretary to undertake responsibility for certain matters respecting Indian affairs, necessarily intended to subject the government to suits for money damages. Because Congress alone can waive the immunity of the United States from suit, *United States* v. *Shaw*, *supra*, 309 U.S. at 502, the decisions of this Court employing such terms as "trusteeship" and "fiduciary" do not support implication of a right of action for damages against the government, absent any evidence that Congress imposed the pertinent statutory duties recognizing and intending that under judicially established principles the effect of prescribing such statutory duties was to create a correlative right of action to recover damages for a statutory violation.

3. The fact that respondents are Indians is not without bearing, however, on the question whether the statutes upon which respondents rely implicitly grant the right to recover damages against the

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failure to challenge assessment of state taxes against an estate, including allotted lands, was not a breach of trust duty, because the United States had acted in reliance upon a subsisting decision of this Court in paying the taxes in question. Because of the sufficiency of this defense on the merits, there was no occasion to argue, or to decide, whether damages could be assessed for a breach of duty. The language that is usually cited from *Mason* ("There is no doubt that the United States serves in a fiduciary capacity with respect to these Indians and that, as such, it is duty bound to exercise great care in administering its trust." 412 U.S. at 398) carries no necessary implication that the remedy available for breach of this duty is damages. Rather, it is our contention that, like the unequivocal statutory command of the Classification Act considered in *Testan*, this language merely reflects the existence of a substantive duty, which may be enforced by non-monetary remedies in a proper case.

United States. In resolving the underlying issue of congressional intent, we cannot ignore that, when most of the statutes now invoked were adopted, the prevailing legal regime generally deprived Indian claimants of any monetary remedy against the United States.

Until 1946, the Court of Claims could not have, in any event, entertained these claims absent a special jurisdictional Act. Section 9 of the Act of Mar. 3, 1863, ch. 92, 12 Stat. 767, Rev. Stat. 1066 (1878 ed.) provided that the jurisdiction of the Court of Claims

> shall not extend to or include any claim against the Government not pending in said court on [December 1, 1862] growing out of or dependent on any treaty stipulation * * * with the Indian tribes.[39]

Moreover, the Court of Claims had concluded that even non-treaty Indian tribal claims could not be maintained without a special jurisdictional act. See, *e.g.*, *Choctaw and Chickasaw Nations* v. *United States*, 75 Ct. Cls. 494, 498-501 (1932).[40] In that setting, it is most unlikely that Congress intended to create a right to recover damages against the

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[39] This disability was continued by Section 153 of the Judicial Code of 1911, ch. 231, 36 Stat. 1138, and Section 1502 of the Judicial Code of 1948, ch. 646, 62 Stat. 942. Although the 1946 Indian Claims Commission Act plainly was intended to overcome this disability (see *United States* v. *Mitchell*, *supra*, 445 U.S. at 538-540 & n.2), this provision was only repealed by adoption of the Act of May 24, 1949, ch. 139, Section 88, 63 Stat. 102.

[40] Congress' awareness of this situation and its intent to alter it is reflected in the legislative history of the Indian Claims Commission Act, ch. 959, 60 Stat. 1049. See, *e.g.*, H.R. Rep. No. 1466, 79th Cong., 1st Sess. 2 n.2 (1945).

United States in 1910 by enacting 25 U.S.C. 407, which authorizes the Secretary to sell timber on tribal lands, or in 1934 by enacting 25 U.S.C. 466, the sustained-yield requirement, which also applies to unallotted lands. And there is no evidence that a different result was expected to follow as to allotted lands covered by 25 U.S.C. 406(a), enacted as a companion to Section 407, or as to allotted lands under 25 U.S.C. 466. Similarly, Congress could not have thought to create a money damages remedy in 1938, by enacting 25 U.S.C. 162a, governing investment of tribal and individual funds.

CONCLUSION

The decision of the Court of Claims should be reversed.

Respectfully submitted.

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APPENDIX

STATUTES INVOLVED

1. The Act of June 25, 1910, ch. 431, Section 8, 36 Stat. 857, as amended by Pub. L. No. 88-301, 78 Stat. 187, 25 U.S.C. 406, provides:

> **(a) Sale of timber on lands held under trust—Deductions for administrative expenses; standards guiding sales**
>
> The timber on any Indian land held under a trust or other patent containing restrictions on alienations may be sold by the owner or owners with the consent of the Secretary of the Interior, and the proceeds from such sales, after deductions for administrative expenses to the extent permissible under section 413 of this title shall be paid to the owner or owners or disposed of for their benefit under regulations to be prescribed by the Secretary of the Interior. It is the intention of Congress that a deduction for administrative expenses may be made in any case unless the deduction would violate a treaty obligation or amount to a taking of private property for public use without just compensation in violation of the fifth amendment to the Constitution. Sales of timber under this subsection shall be based upon a consideration of the needs and best interests of the Indian owner and his heirs. The Secretary shall take into consideration, among other things, (1) the state of growth of the timber and the need for maintaining the productive capacity of the land for the benefit of the owner and his heirs, (2) the highest and best use of the land, including the

advisability and practicality of devoting it to other uses for the benefit of the owner and his heirs, and (3) the present and future financial needs of the owner and his heirs.

(b) Undivided interests

Upon the request of the owners of a majority Indian interest in land in which any undivided interest is held under a trust or other patent containing restrictions on alienations, the Secretary of the Interior is authorized to sell all undivided Indian trust or restricted interests in any part of the timber on such land.

(c) Unrestricted interests

Upon the request of the owner of an undivided but unrestricted interest in land in which there are trust or restricted Indian interests, the Secretary of the Interior is authorized to include such unrestricted interest in a sale of the trust or restricted Indian interests in timber sold pursuant to this section, and to perform any functions required of him by the contract of sale for both the restricted and unrestricted interests, including the collection and disbursement of payments for timber and the deduction from such payments of sums in lieu of administrative expenses.

(d) Representation of minors and others

For the purposes of this Act, the Secretary of the Interior is authorized to represent any Indian owner (1) who is a minor, (2) who has been adjudicated non compos mentis, (3) whose ownership interest in a decedent's estate has

not been determined, or (4) who cannot be located by the Secretary after a reasonable and diligent search and the giving of notice by publication.

(e) Emergency sales

The timber on any Indian land held under a trust or other patent containing restrictions on alienations may be sold by the Secretary of the Interior without the consent of the owners when in his judgment such action is necessary to prevent loss of values resulting from fire, insects disease, windthrow, or other natural catastrophes.

(f) Change in status without affecting contractual obligations

A change from a trust or restricted status to an unrestricted status of any interest in timber that has been sold pursuant to this section shall not affect the obligations of the Secretary of the Interior under any contract of sale that is in effect at the time such change in status occurs.

2. The Act of June 25, 1910, ch. 431, Section 7, 36 Stat. 857, as amended by Pub. L. No. 88-301, 78 Stat. 186, 25 U.S.C. 407, provides:

Sale of timber on unallotted lands

The timber on unallotted lands of any Indian reservation may be sold in accordance with the principles of sustained yield, or in order to convert the land to a more desirable use, under regulations to be prescribed by the Secretary of the Interior, and the proceeds from such sales, after deductions for administrative expenses pur-

suant to section 413 of this title, shall be used for the benefit of the Indians who are members of the tribe or tribes concerned in such manner as he may direct.

3. The Indian Reorganization Act of 1934, ch. 576, Section 6, 48 Stat. 986, 25 U.S.C. 466, provides:

Indian forestry units; rules and regulations

The Secretary of the Interior is directed to make rules and regulations for the operation and management of Indian forestry units on the principle of sustained-yield management, to restrict the number of livestock grazed on Indian range units to be estimated carrying capacity of such ranges, and to promulgate such other rules and regulations as may be necessary to protect the range from deterioration, to prevent soil erosion, to assure full utilization of the range, and like purposes.

4. The Act of May 26, 1928, ch. 756, 45 Stat. 750, 25 U.S.C. 318a, provides:

Roads on Indian reservations; appropriation

Appropriations are hereby authorized out of any money in the Treasury not otherwise appropriated for material, equipment, supervision and engineering, and the employment of Indian labor in survey, improvement, construction, and maintenance of Indian reservation roads not eligible to Government aid under the Federal Highway Act and for which no other appropriation is available, under such rules and regulations as may be prescribed by the Secretary of the Interior.

5. The Act of Feb. 5, 1948, ch. 45, Section 1, 62 Stat. 17, 25 U.S.C. 323, provides:

> **Rights-of-way for all purposes across any Indian lands**
>
> The Secretary of the Interior be, and he is empowered to grant rights-of-way for all purposes, subject to such conditions as he may prescribe, over and across any lands now or hereafter held in trust by the United States or individual Indians or Indian tribes, communities, bands or nations, or any lands now or hereafter owned, subject to restrictions against alienation, by individual Indians or Indian tribes, communities, bands or nations, including the lands belonging to the Pueblo Indians in New Mexico, and any other lands heretofore or hereafter acquired or set aside for the use and benefit of the Indians.

6. The Act of Feb. 5, 1948, ch. 45, Section 2, 62 Stat. 18, 25 U.S.C. 324, provides:

> **Consent of certain tribes; consent of individual Indians**
>
> No grant of a right-of-way over and across any lands belonging to a tribe organized under sections 461-473 and 474-479, of this title; sections 396 and 473a of this title and sections 358a and 362 of Title 48; and subchapter VIII of chapter 14 of this title, shall be made without the consent of the proper tribal officials. Rights-of-way over and across lands of individual Indians may be granted without the consent of the individual Indian owners if (1) the land is owned by more than one person, and the owners

or owner of a majority of the interests therein consent to the grant; (2) the whereabouts of the owner of the land or an interest therein are unknown, and the owners or owner of any interest therein whose whereabouts are known, or a majority thereof, consent to the grant; (3) the heirs or devisees of a deceased owner of the land or an interest therein have not been determined, and the Secretary of the Interior finds that the grant will cause no substantial injury to the land or any owner thereof; or (4) the owners of interests in the land are so numerous that the Secretary finds it would be impracticable to obtain their consent, and also finds that the grant will cause no substantial injury to the land or any owner thereof.

7. The Act of Feb. 5, 1948, ch. 45, Section 3, 62 Stat. 18, 25 U.S.C. 325, provides:

Payment and disposition of compensation

No grant of a right-of-way shall be made without the payment of such compensation as the Secretary of the Interior shall determine to be just. The compensation received on behalf of the Indian owners shall be disposed of under rules and regulations to be prescribed by the Secretary of the Interior.

8. The Act of June 24, 1938, ch. 648, Section 1, 52 Stat. 1037, 25 U.S.C. 162a, provides:

Deposit of tribal funds in banks; bond or collateral security; investments

The Secretary of the Interior is hereby authorized in his discretion, and under such rules and regulations as he may prescribe, to withdraw

from the United States Treasury and to deposit in banks to be selected by him the common or community funds of any Indian tribe which are or may hereafter be, held in trust by the United States and on which the United States is not obligated by law to pay interest at higher rates than can be procured from banks. The said Secretary is also authorized, under such rules and regulations as he may prescribe, to deposit in banks to be selected by him the funds held in trust by the United States for the benefit of individual Indians: *Provided*, That no individual Indian money shall be deposited in any bank until the bank shall have agreed to pay interest thereon at a reasonable rate, subject, however, to the regulations of the Board of Governors of the Federal Reserve System in the case of member banks, and of the Board of Directors of the Federal Deposit Insurance Corporation in the cases of insured nonmember banks, except that the payment of interest may be waived in the discretion of the Secretary of the Interior on any deposit which is payable on demand: *Provided further*, That no tribal or individual Indian money shall be deposited in any bank until the bank shall have furnished an acceptable bond or pledged collateral security therefor in the form of any public-debt obligations of the United States and any bonds, notes, or other obligations which are unconditionally guaranteed as to both interest and principal by the United States, except that no such bond or collateral shall be required to be furnished by any such bank which is entitled to the benefits of section 12B of The Federal Reserve Act, with respect to any deposits

of such tribal or individual funds to the extent that such deposits are insured under such section: *Provided, however,* That nothing contained in this section or in section 264 of Title 12B of the Federal Reserve Act, shall operate to deprive any Indian having unrestricted funds on deposit in any such bank of the full protection afforded by section 12B of the Federal Reserve Act, irrespective of any interest such Indian may have in any restricted Indian funds on deposit in the same bank to the credit of a disbursing agent of the United States. For the purpose of this section and said Act, said unrestricted funds shall constitute a separate and distinct basis for an insurance claim: *Provided further,* That the Secretary of the Interior, if he deems it advisable and for the best interest of the Indians, may invest the trust funds of any tribe or individual Indian in any public-debt obligations of the United States and in any bonds, notes, or other obligations which are unconditionally guaranteed as to both interest and principal by the United States: *And provided further,* That the foregoing shall apply to the funds of the Osage Tribe of Indians, and the individual members thereof, only with respect to the deposit of such funds in banks.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1982 386206 1087

Respondent's Brief

Office - Supreme Court, U.S.
FILED
NOV 8 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1748

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA,
Petitioner,

v.

HELEN MITCHELL, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Claims

BRIEF FOR RESPONDENTS

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QUESTION PRESENTED

Whether the United States must restore the loss it causes when, acting as trustee, it sells Indian timber for less than its value and commits other acts of mismanagement which cause monetary loss to the Indian beneficiaries.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 81-1748

UNITED STATES OF AMERICA,
Petitioner,

v.

HELEN MITCHELL, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Claims

BRIEF FOR RESPONDENTS

Respondents, Helen Mitchell, other individual Indian owners of allotted land on the Quinault Indian Reservation, and the Quinault Indian Tribe, respectfully urge the Court to affirm the decision of the United States Court of Claims, reported at 664 F.2d 265.

STATUTES INVOLVED

The statutes involved in this case are quoted at pages 1a through 8a of the Appendix to the Brief for the United States, with two exceptions.

The "Tucker Act," 28 U.S.C. § 1491, provides:

> "The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort."

The "Indian Tucker Act," 28 U.S.C. § 1505, reads:

> "The Court of Claims shall have jurisdiction of any claim against the United States accruing after August 13, 1946, in favor of any tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska whenever such claim is one arising under the Constitution, laws or treaties of the United States, or Executive orders of the President, or is one which otherwise would be cognizable in the Court of Claims if the claimant were not an Indian tribe, band or group."

STATEMENT OF THE CASE

I. Historical Background

The individual respondents herein are descendants of the Indians of several tribes which originally owned and occupied portions of the Pacific coastal region of the United States north of the Columbia River.[1]

In 1855, the United States entered into a treaty with certain of those tribes.[2] It also wanted the other, neigh-

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[1] A map showing the locations of the several tribes appears in the frontispiece of the Brief for Respondents filed in this Court in an earlier proceeding involving this case, No. 78-1756 (filed September 24, 1979). That brief and appendix contain other useful background material.

[2] The Treaty of Olympia, 12 Stat. 971, was ratified in 1859. The signatory tribes included the Quinault Tribe (along with the Queets, a sub-tribe of the Quinault) and the Quileute Tribe (along with the Hoh, a sub-tribe of the Quileute).

boring tribes to join in the treaty and, although they refused to do so,[3] the United States thereafter treated those tribes as if they had signed the treaty, and patented their lands to non-Indian settlers.

The Treaty of Olympia directed that a reservation be selected and set apart by the President for those Indians. In 1873, President Grant set aside some 200,000 acres within the Quinaults' aboriginal territory, and declared that that reservation would be held "for the use of the Quinaielt, Quillehute, Hoh, Quit, and other tribes of fish-eating Indians on the Pacific Coast . . . ." Executive Order of November 4, 1873, 1 Kapp. 923.

The Reservation was heavily forested and, for that and other reasons, none of the non-Quinault Indians moved onto the Reservation; instead, they continued to live where they had always lived. Only the Quinaults lived on the Reservation, in their traditional Indian villages of Taholah and Queets.

In 1905, the federal government began to allot the Quinault Reservation, in trust, to individual Indians of the tribes mentioned in notes 2 and 3 *supra*, pursuant to the Treaty of Olympia, the Executive Order of 1873, and the General Allotment Act of 1887, 24 Stat. 388, 25 U.S.C. § 348. *See also* Quinault Allotment Act of March 4, 1911, 36 Stat. 1345.

Although the Government initially determined that the forested areas of the Reservation were not to be allotted, this Court, in *United States v. Payne*, 264 U.S. 446 (1924), ordered the allotment of those lands and, by 1933, the Reservation land was completely allotted, divided into 2,340 trust allotments, most of approximately 80 acres and heavily timbered. Most of the allottees were members

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[3] The principal other tribes were the Chehalis, Chinook and Cowlitz Tribes. *See* 8 Ind. Cl. Comm. 436, 441-44, 473 (1960) (Chehalis); 6 Ind. Cl. Comm. 177, 183-95, 207 (1958) (Chinook); 21 Ind. Cl. Comm. 143, 151, 166-70 (1969) (Cowlitz).

of the tribes other than the Quinault Tribe, and were non-residents of the Reservation.

Each allottee received a deed, signed in the name of the President of the United States, containing the promise that the United States would hold the allotment for a period of 25 years, "in trust for the sole use and benefit of the Indian . . . or, in the case of his decease, of his heirs . . . ."[4] The trust period was extended indefinitely by Section 2 of the Indian Reorganization Act of 1934, 25 U.S.C. § 462.[5]

Although the general allotment plan contemplated that allottees would take up residence on their allotments and engage in farming or grazing, that was, from the very beginning, a practical impossibility on the Quinault Reservation because of its heavy forestation. Even today, the great majority of allottees live off the Reservation, some on other Indian reservations, others in non-Indian communities.

Approximately one-third of the allotments of the Quinault Reservation have since gone out of trust, either through sales to non-Indians or through inheritance by persons ineligible to own Indian trust land. As a result, the Reservation today is a complex checkerboard of trust allotments and former trust allotments. Furthermore, many of the trust allotments are now in "heirship sta-

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[4] This language was included in each deed pursuant to Section 5 of the General Allotment Act of 1887, 24 Stat. 388, 25 U.S.C. § 348. (1976). The full language of the trust patents is set forth in *Squire v. Capoeman*, 351 U.S. 1, 4 n.6 (1956) (a case which involved the rights of one of the respondents herein).

[5] The general trust relationship between the United States and the Quinault *Tribe* was established by the Treaty of Olympia, 12 Stat. 971. By express Acts of Congress, the United States owns the *tribal* land in trust for the Tribe, some pursuant to Section 5 of the Indian Reorganization Act, 25 U.S.C. § 465, and some by special Acts, *see e.g.*, Act of October 15, 1962, 76 Stat. 913 (lands "set aside in trust for the Quinault Tribe of Indians").

tus," meaning that they are held in undivided ownership by numerous heirs (sometimes hundreds of heirs) of deceased original allottees. Such ownership often renders use by any one of the heirs impractical.[6]

In 1920, pursuant to the Act of June 25, 1910, 36 Stat. 857, 25 U.S.C. §§ 406 and 407, the Government began to undertake sales[7] of the Quinault allottees' timber, usually under long-term, large-volume contracts covering many allotments. There have been 14 such contracts entered into since 1920; one of those contracts (the Crane Creek Unit, *see* Appendix B) is still on-going.

The Government, through the Secretary of the Interior and the Bureau of Indian Affairs ("BIA"), has continuously exercised total control over the management and disposition of the Indians' lands and timber on the Quinault Reservation. It was, for example, BIA forestry personnel, not the Indians, who determined what blocks

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[6] The multiple ownership problem is one of the reasons why the Indians need federal trust management, in addition to the main reason that the individual Indian has neither the expertise for managing forest property to produce income nor the ownership of sufficient acreage to permit efficient production.

[7] As reflected in the 1910 Act, the Government's basic statutory responsibility is to *sell* the Indians' timber. In this context, it is important to note that, in the timber industry, a "sale" is not a single event, but a manifold process, which includes many functions that may be deemed "management" functions. A timber "sale" involves, for example, the gathering of technical silvicultural data and the application of that data to the bidding and price adjustment mechanism; it involves supervision of the loggers who buy the timber, to see to it that road plans and logging methods do not damage the land and that proper credit is given as trees are cut; and it involves assuring that the loggers rehabilitate the land when logging is completed and arranging for new timber to start growing. The BIA is well aware of this manifold meaning of a "sale," as is shown by the 1920 General Timber Sales Regulations which are incorporated into every logging contract, including the contracts involved in this case. A copy of one of those contracts is reprinted as Appendix B to this Brief, and the 1920 regulations appended thereto appear at pages 11b-16b *infra*.

(units) of timber would be put up for sale. The BIA then secured powers of attorney from the allottee owners (or a tribal resolution, in the case of tribal land), and handled every detailed aspect of the sale—including advertising for bids; letting the contracts; and supervising the loggers who built roads, cut the timber, and hauled it off. The BIA saw to the counting and grading of logs, collected the money, deducted its fee, and credited the balance to the allottees' (or the Tribe's) BIA accounts. The Indians had nothing to do with the entire operation, except to sign the initial powers of attorney and to receive payment. The Government has total control over this process, as was well described in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145-47 (1980).[8]

The respondent allottees are totally dependent upon the Government to manage their timber. Many have substandard educations, and many of them do not even know the exact physical location of their allotments. Practically none of them earns anything from his or her allotment except when the once-in-a-lifetime timber sale occurs. The Indian allotment owner is not even allowed to cut and sell timber from his or her own allotment without the permission of the BIA and without posting a bond to assure compliance with BIA harvesting regulations. *See Kirschling v. Watt*, No. C81-405 (W.D. Wash. September 1, 1982).

The trust responsibilities of the federal government on the Quinault Reservation are neither passive nor gratuitous. At all times relevant here, the BIA has exercised active, pervasive and total control over the management and disposition of the Indians' land and timber, and it

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[8] This total control was approved over the objections of the Quinault allottees in *United States v. Eastman*, 118 F.2d 421, 424 (9th Cir.), *cert. denied*, 314 U.S. 635 (1941). The Court said that the Secretary's statutory duty was not only to see that the timber was not sold for an "improvident . . . price," but also to see that logging was properly conducted. See also *Starr v. Campbell*, 208 U.S. 527, 533 (1908).

has done so for a substantial fee.[9] At all times relevant, the Quinault allottees have necessarily relied upon the BIA to do so.

II. History of the Litigation

This case, initiated in 1971, involves the claims of the Quinault Indian Tribe and some 1,465 individual Indian allottees for monetary losses incurred by them as the result of improvident pricing and other mismanagement of their trust property by their trustee, the Government. Respondents claim that the Government's mismanagement has caused monetary loss to them by reason of the sale of some of their property to third parties without adequate consideration and by other forms of uncompensated reduction in the value of their property, such as failure to manage timber on a sustained-yield basis; failure to obtain payment for merchantable timber; failure to protect the land by developing a proper system of roads and easements; failure to pay interest on trust funds entitled to interest; failure to pay sufficient interest on trust funds; exaction of improper charges for roads and other logging costs; and exaction of excessive administrative fees.

Respondents' claims have been the subject of six reported decisions so far: *Capoeman v. United States*, 440 F.2d 1002 (Ct. Cl. 1971); *Quinault Allottee Ass'n v. United States*, 453 F.2d 1272 (Ct. Cl. 1972); *Quinault Allottee Ass'n v. United States*, 485 F.2d 1391 (Ct. Cl. 1973), *cert. denied*, 416 U.S. 961 (1974); *Mitchell v. United States*, 591 F.2d 1300 (Ct. Cl. 1979); *United*

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[9] The Government charges a fee of up to 10 percent of the sales prices for the services it performs as trustee. *See* 25 U.S.C. § 415; 25 C.F.R. § 141.18; *Capoeman v. United States*, 440 F.2d 1002 (Ct. Cl. 1971).

States v. Mitchell, 445 U.S. 535 (1980) (*"Mitchell I"*); and *Mitchell v. United States*, 664 F.2d 265 (Ct. Cl. 1981).[10] This Court's decision in the instant proceeding will be the seventh reported decision.

In its 1971 decision, the Court of Claims ruled that the statute of limitations barred a claim by one of the individual plaintiffs, but it recited that it had jurisdiction to entertain the case, and the Government made no assertion to the contrary.[11]

In its 1972 decision, the court held that the allottees met the requirements of a class action under its rules, but designated the case an "opt-in," rather than "opt-out," class action. Ultimately, 1,465 individual allottees

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[10] The case has also been the subject of extensive scholarly comment. *See, e.g.*, Hughes, *Can the Trustee Be Sued for its Breach? The Sad Saga of United States v. Mitchell*, 26 S.D. L. Rev. 447 (1981); Newton, *Enforcing the Federal-Indian Trust Relationship After Mitchell*, 31 Cath. U. L. Rev. 635 (1982); Orme, *Tucker Act Jurisdiction Over Breach of Trust Claims*, 1979 B.Y.U. L. Rev. 855; Note, *Indian Breach of Trust Suits*, 33 Rutgers L. Rev. 502 (1981); Note, *Whom Can Indians Trust After Mitchell?*, 53 U. Colo. L. Rev. 179 (1981).

[11] The Court of Claims' jurisdiction to entertain Indian claims against the United States for breaches of trust had been thought clear since that court's decision in *Klamath & Modoc Tribes v. United States*, 174 Ct. Cl. 483 (1966), and has been exercised many times without challenge since then (*see* cases cited at pages 30-31 *infra*). Significantly, the *Klamath* case was decided by the same judges and during the same term as *Eastport S.S. Corp. v. United States*, 372 F.2d 1002 (Ct. Cl. 1967), in which the Court of Claims articulated the "fairly mandating compensation" standard later adopted by this Court in *United States v. Testan*, 424 U.S. 392 (1976), which is discussed at length hereinbelow. Another case in which the Court of Claims found jurisdiction for breach of trust claims was *Mason v. United States*, 461 F.2d 1364, 1372 (Ct. Cl. 1972); this Court, in reversing on the merits, noted jurisdiction without objection. *See* 412 U.S. 391, 394 n.5 (1973).

—a substantial majority of potential claimants—elected to join in the lawsuit. And, in the 1973 case, the court held that the United States was entitled to deduct a management fee from the proceeds of the Quinault allottees' timber sales (*see* note 9 *supra*); again, neither the Government nor the court questioned the court's jurisdiction.

For some six years, during and after those three partial adjudications, the plaintiffs engaged in discovery, including many depositions, extensive searches of massive Government records, the development of over 20,000 pages of plaintiffs' exhibits, extensive investigations and the preparation of reports of numerous expert witnesses in anticipation of trial.[12]

The trial was to be divided into several phases. The first phase—dealing with historical and ethnological aspects of the case—was held in Seattle in early 1977, and lasted three weeks. Following that trial, the United States filed a motion to dismiss the case for lack of jurisdiction, and all further proceedings were thereupon suspended.

In its 1979 *Mitchell* decision, the Court of Claims ruled that the General Allotment Act of 1887, 24 Stat. 388, 25 U.S.C. § 348, by itself, was a sufficient basis to warrant its exercise of jurisdiction over the Indians' money damages claims against the United States for breach of trust. (Because it so ruled, the court did not go on to address the other jurisdictional bases advanced by the plaintiffs.)

This Court granted a writ of certiorari to review that decision and, in *Mitchell I*, it reversed the ruling of the Court of Claims, holding (1) that the General Allotment Act "created only a limited trust relationship between the United States and the allottee that does not impose

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[12] During 1971-1977, the allottees paid expenses of $730,000, primarily for the fees and expenses of 12 expert witnesses.

any duty upon the Government to manage timber resources" (445 U.S. at 542); (2) that the Act "should not be read as authorizing, much less requiring, the Government to manage timber resources for the benefit of Indian allottees" (*id.* at 545); and (3) that "[a]ny right of the respondents to recover money damages for Government mismanagement of timber resources must [therefore] be found in some source other than that Act" (*id.* at 546). Justice White—with whom Justice Brennan and Justice Stevens joined in dissent—argued that the General Allotment Act did create a meaningful trust relationship between the United States and the Indian allottees (*id.* at 547-48); that it did impose upon the United States "fiduciary obligations in the performance of its management functions" (*id.* at 549); and that "liability in damages for the breach of these obligations"

> "follows naturally from the existence of a trust and of fiduciary duties. It is hornbook law that the trustee is accountable in damages for breaches of trust. See Restatement §§ 205-212; Bogert § 862; 3 Scott § 205."[18]

On remand, in its 1981 *Mitchell* decision, the Court of Claims, by a 6-to-1 vote, has held (1) that the federal Indian timber management statutes, 25 U.S.C. §§ 406-407, 466, 318, 323-325 and 162a, and regulations promulgated pursuant thereto, impose specific fiduciary duties upon the United States in connection with the sale and management of Indian land, timber and funds held in trust by the United States; (2) that those statutes and regulations mandate compensation for damages sustained as a result of the Government's breach of those duties;

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[18] *Id.* at 550. Because it had ruled that the General Allotment Act had imposed no management duties upon the United States, the majority expressly declined to address this final, basic point made by Justice White in his dissenting opinion. *See id.* at 542.

and (3) that, under 28 U.S.C. §§ 1491 (the Tucker Act) and 1505 (the "Indian Tucker Act"), the Court of Claims has jurisdiction to adjudicate such claims.

On June 7, 1982, this Court granted a writ of certiorari to review that decision.

SUMMARY OF THE ARGUMENT

The principles which govern the instant controversy were articulated by this Court in *United States v. Testan*, 424 U.S. 392, 401-02 (1976):

> "Where the United States is the defendant and the plaintiff is not suing for money improperly exacted or retained,[14] the basis of the federal claim—whether it be the Constitution, a statute, or a regulation—does not create a cause of action for money damages unless, as the Court of Claims has stated, that basis 'in itself . . . can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.' *Eastport S.S. Corp. v. United States*, 178 Ct. Cl., at 607, 372 F.2d, at 1008, 1009."

Thus, a waiver of federal sovereign immunity will be deemed to have occurred where the constitutional, statutory or regulatory basis of a claim against the United States "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained."

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[14] As discussed in Section IV of the Argument hereinbelow, respondents submit that their claims are the equivalent of claims "for money improperly exacted or retained," and—on that basis alone—properly within the jurisdiction of the Court of Claims. *See* pages 34-37 *infra*. Because the court below based its exercise of jurisdiction on respondents' satisfaction of the *Testan* "fairly . . . mandating compensation" test, however, it is to that point that respondents address their principal arguments herein.

We submit that the many federal statutes and regulations governing the management and sale of Indian timber trust resources—which expressly mandate that such management and sale be conducted so as to convert the Indians' trust property into its full monetary equivalent for the benefit of the Indians and that the proceeds of such sales be paid to them or used for their benefit—cannot fairly be construed otherwise than as "mandating compensation" for damages incurred as a result of the Government's mismanagement and waste of such trust resources.

It is not required, as the Government suggests, that Congress have specifically contemplated and approved a suit for damages; it is enough that Congress intended that the beneficiaries be entitled to the payment of money. Given that, a suit for damages lies under the Tucker Act.

Moreover, consistent with this Court's rulings in *Testan* and *Mitchell I*, the Court of Claims has jurisdiction to entertain and rule upon respondents' claims because of the express trust relationships which the Congress has established between the United States and the respondents. Congressional establishment of those relationships and the imposition, by statute and regulation, of specific management responsibilities upon the United States as trustee constituted a waiver of federal sovereign immunity from suit for money damages in the event of the Government's breach of its trust responsibilities.

The court below also had jurisdiction over these claims by virtue of (1) the fact that respondents' claims are equivalent to claims for "money improperly exacted or retained," or (2) the express and implied contractual relationships which the United States has entered into with the respondents in respect of the subject timber resources.

ARGUMENT

I. This Court's decision in *Testan* requires only that the statute upon which the claim is based create a right to the payment of money (*i.e.*, that it mandate compensation), and not necessarily that it expressly authorize the maintenance of a damage suit against the United States.

While disclaiming any intention to "call in question the fundamental reasoning, much less the result, of *Testan*, . . . [*Mitchell I*], or any other of this Court's decisions," [15] the Government is, in truth, asking the Court to rewrite *Testan* in a way that would create a new—and virtually always insurmountable—obstacle to the assertion of meritorious Tucker Act claims against the United States. Under *Testan* as this Court actually wrote it, a claimant must show [16] (1) that his claim is "founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department" (28 U.S.C. § 1491), and (2) that the constitutional provision, statute or regulation relied upon "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained" (424 U.S. at 400, 402).

The Government would now add a third requirement—that the constitutional provision, statute or regulation relied upon must itself expressly "address[] . . . the institution of litigation against the United States." Brief for the United States, at 19-20; *see id.* at 20 ("expressly provide[] for maintenance of such suits"), 29 ("expressly consent[] to maintenance of suits against the United States"). Respondents submit that this Court did

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[15] Brief for the United States, at 19 n.12.

[16] If a claimant is suing for breach of contract, for money or property improperly exacted or retained, or for property taken without just compensation, the jurisdictional question here under discussion is absent, and *Testan* is irrelevant.

not, in *Testan*, extend the "fairly mandating compensation" requirement to require also an independent (indeed, a redundant) expression of consent to sue the United States for failure to pay compensation mandated by statute. Rather, respondents submit, the Tucker Act constitutes the consent to suit, *provided only that there exists a substantive right to monetary compensation.*[17]

At other points in its brief, the Government retreats a bit from its Draconian misreading of the *Testan* rule.[18] Even then, however, it insists that the constitutional, statutory or regulatory basis of a cause of action (or its

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[17] The Government itself very nearly makes this point in its own brief:

> "Technically, we think it more accurate to say that the Tucker Act itself effects a conditional waiver of the otherwise absolute immunity of the United States from being sued eo nominee. *See, e.g., Army & Air Force Exchange Service v. Sheehan*, No. 80-1437 (June 1, 1982), slip op. 6; *United States v. Sherwood*, 312 U.S. 584, 590 (1941). The waiver is effective whenever an independent basis for recovery of damages exists, be it a contract, the government's retention of funds owned by the claimant (see 424 U.S. at 400) or another statute that *creates a right of action in damages* against the United States for breach of a statutory command (*ibid.*)."

Brief for the United States, at 19 n.12 (emphasis added). We agree with this analysis of the Tucker Act except for the mistaken reading of *Testan* reflected in the words italicized above. Congress need not waive sovereign immunity twice. The "[]other statute" need not expressly authorize a suit for damages—it need only create a right to the payment of money; it need only "mandat[e] compensation by the Federal Government for the damage sustained." *See* notes 18-22 *infra* and accompanying text.

[18] The Government, in its brief, presents a myriad of different and inconsistent restatements of the rule articulated by the Court of Claims in *Eastport* and adopted by this Court in *Testan*. Because of the Government's scattergun approach to the issue, it is difficult, if not impossible, to ascertain precisely how it would have the Court reformulate the *Testan* rule in this case. We believe that the analysis set forth in this Section will demonstrate that the law, as stated in *Eastport*, *Testan* and *Mitchell I*, is nowhere near as convoluted as the Government's treatment of the issue would suggest.

legislative or administrative history) must reflect an affirmative determination that a *suit for damages* is contemplated and approved. *See* Brief for the United States, at 20 and n.13, 20-22, 30-39. This reformulation, too, mischaracterizes this Court's decisions in *Testan* and *Mitchell I*. In *Testan*, the Court stated:

> "The Tucker Act, of course, is itself only a jurisdictional statute; it does not create any substantive right enforceable against the United States for money damages. The Court of Claims has recognized that the Act merely confers jurisdiction upon it whenever the substantive right exists. *Eastport S.S. Corp. v. United States*, 178 Ct. Cl. 599, 605-607, 372 F.2d 1002, 1007-1009 (1967)."

424 U.S. at 398. *Testan*, like *Eastport*, requires *not* that the operative constitutional provision, statute or regulation expressly consent to a suit for damages, but only that it unequivocally create a *"substantive right" to the payment of money.*[19] As the Court of Claims explained in *Eastport*:

> "[This] category [of cases] includes the varied litigations in which we are urged to hold that some specific provision of law *embodies a command to the United States to pay the plaintiff some money*, upon proof of conditions which he is said to meet . . . .[20]

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[19] *See* note 17 *supra* and accompanying text; notes 20-21 *infra* and accompanying text. Indeed, the fact that this Court has recognized that a *regulation* may serve as "the basis of the federal claim" if it "can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained" (424 U.S. at 401-02; *see Army & Air Force Exchange Service v. Sheehan*, 50 U.S.L.W. 4562, 4565 and n.11 (June 1, 1982)) makes this absolutely clear—for, certainly, no executive agency has the power, by regulation, to waive the sovereign immunity of the United States, although it often does have the power to create rights to payment of money.

[20] The court went on to illustrate this principle as follows:

> "Familiar examples are inverse eminent domain by a taking without formal proceedings (United States v. Causby, 328 U.S. 256 (1946)); a suit by a separated reserve officer for disability

> ". . . . Where the claimant is not suing for money improperly exacted or retained . . . , the historical boundaries of our competence have excluded those instances in which the basis of the federal claim—be it the Constitution, a statute, or a regulation—cannot be held to command, in itself and as correctly interpreted, *the payment of money* . . . . Under Section 1491 what one must always ask is whether the constitutional clause or the legislation [or regulation] which the claimant cites can fairly be interpreted as *mandating compensation* by the Federal Government for the damage sustained."

372 F.2d at 1008-09 (emphasis added). This, of course, is precisely the standard adopted by this Court in *Testan* and, however the determinative *Eastport/Testan* question is properly phrased—Do the statutes and regulations relied upon embody "a command to the United States to pay the plaintiff some money"? Do they "command, in [themselves] and as correctly interpreted, the payment of money"? Can they "fairly be interpreted as mandating compensation by the Federal Government for the damage sustained"?—the answer in this case, as detailed in Section II of the Argument herein, must be a resound-

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retired pay (Lemly v. United States, 75 F. Supp. 248, 109 Ct. Cl. 760 (1948)); an action for back pay occasioned by a wrongful dismissal from the civil service (Elchibegoff v. United States, 106 Ct. Cl. 541 (1946), cert. granted, 329 U.S. 704 (1946), cert. dismissed, 329 U.S. 694 (1947)); or a claim for compensation for flood damage authorized by statute (United States v. Gerlach Live Stock Co., 339 U.S. 725 (1950)). See also, United States v. Central Eureka Mining Co., 357 U.S. 155, 162-165, 169-179 (1958); Bell v. United States, 366 U.S. 393 (1961). In this type of case, we have held, 'a claimant who says that he is entitled to money from the United States because a statute or a regulation [or the Constitution] grants him that right, in terms or by implication, can properly come to the Court of Claims, at least if his claim is not frivolous but arguable.' Ralston Steel Corp. v. United States, 340 F.2d 663, 667, 169 Ct. Cl. 119, 125 (1965), cert. denied, 381 U.S. 950."

372 F.2d at 1008.

ing "Yes, they certainly do." Neither the Government's semantic legerdemain [21] nor this Court's rulings in *Testan* and *Mitchell I* should even suggest otherwise.

In *Testan*, this Court concluded, on the basis of its *Eastport* analysis, "that neither the Classification Act nor the Back Pay Act creates a substantive right in the respondents to backpay for the period of their claimed wrongful classifications." 424 U.S. at 407. The teaching of *Testan* is perfectly simple—the Classification Act created a right only to a classification; neither it nor the

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[21] The Government argues that "a statutory right to payment of money does not invariably create a remedy against the United States in the event of nonpayment. Whether it does turns upon the intent of Congress." Brief for the United States, at 20 n.13. *See also id.* at 21 ("And the existence of a right to payment does not invariably connote congressional consent to maintenance of actions to recover damages"). We submit that these statements are as misleading as they are superficially attractive—and that the key word in both statements is "invariably." While it is true that the existence of a statutory right to the payment of money does not *invariably* give rise to a cause of action under the Tucker Act—because Congress obviously has the power to preclude such actions—a more precise statement of the law would be that the statutory creation of a substantive right to the payment of money *is* a sufficient basis for the maintenance of a claim under the Tucker Act *unless* Congress manifests its intent otherwise, such as by creating another non-monetary remedy that may reasonably be deemed to be intended as the exclusive remedy (as in *Testan*). Respondents believe that the foregoing analysis of *Eastport*, *Testan* and *Mitchell I* demonstrates the soundness of their position herein, and none of the authorities cited by the Government to illustrate exceptions to the rule (*see id.* at 21-22) undermines that position. In each of the Government's examples, judicial redress of a substantive right was denied only because of a demonstrable "congressional determination to withhold a damages remedy against the United States." *Id.* at 22. Absent such a determination, the *Testan* rule would have been satisfied, the Government's breach of a promise to pay money would have been actionable, and jurisdiction would properly have been exercised—as, indeed, it was in the other cases cited in that section of the Government's brief. *See Jacobs v. United States*, 290 U.S. 13, 16 (1933); *United States v. Hvoslef*, 237 U.S. 1, 10 (1915); *Medbury v. United States*, 173 U.S. 492, 497 (1899).

Back Pay Act conferred upon the claimants a substantive right to the *payment of money*. And, in *Mitchell I*, the Court concluded that "the [General Allotment] Act created only a limited trust relationship between the United States and the allottee that does not impose any duty upon the Government to manage timber resources." 445 U.S. at 542. That is, the General Allotment Act created no duty to sell or manage; *a fortiori*, there could be no substantive right, under that Act standing alone, to the payment of money for mismanagement.

II. The basic purpose of the federal Indian timber sales statutes and regulations is the generation of money for the Indians through the sale of their timber at full value and, when the United States sells the timber for less than its full value or otherwise breaches its obligations under those statutes and regulations, the Indian cestuis have a right to compensation for monetary losses incurred as a result of such breaches.

Responsibility for the sale and management of the timber resources of lands allotted to individual Indians is vested in the Secretary of the Interior (43 U.S.C. § 1457) and exercised by the Interior Department's Bureau of Indian Affairs (25 U.S.C. § 2). *See* 25 U.S.C. §§ 406-407 (timber sales); 25 U.S.C. § 466 (sustained-yield management and the promulgation of regulations with respect thereto); 25 U.S.C. §§ 318a, 323-325 (roads and rights-of-way); 25 C.F.R. §§ 141.1-141.23 (Indian forest management regulations). *See also* 25 U.S.C. § 413 (administrative fees); 25 U.S.C. § 162a (investment of funds).

As noted recently by this Court in *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980), "the Federal Government's regulation of the harvesting of Indian timber is comprehensive" (*id.* at 145) and, within the elaborate statutory and regulatory structure established by the Congress for the benefit of the Indian owners of such timber, "the Bureau of Indian Affairs exercises literally daily supervision over the harvesting and manage-

ment of tribal [and allotted] timber" (*id.* at 147). Unlike the General Allotment Act of 1887 standing alone, these statutes and regulations engraft specific duties into the United States' trusteeship under the Allotment Act, to sell the timber for its full value and to manage the timber on a sustained-yield basis for the benefit of the beneficial owners.[22] The statutes and regulations here in issue have been enacted and promulgated in order to achieve the express and

> "overriding federal objective of guaranteeing Indians that they will 'receive . . . the benefit of whatever profit [the forest] is capable of yielding . . . .'"

White Mountain Apache Tribe v. Bracker, *supra*, 448 U.S. at 149, *quoting* 25 C.F.R. § 141.3(a)(3) (1979). *See also* 448 U.S. at 147.

When, in the exercise of its trust responsibilities over its beneficiaries' trust resources, the United States fails to pursue that federal objective and, by mismanagement and waste, violates its fiduciary duties and causes substantial monetary loss to its beneficiaries, the statutes and regulations imposing those duties implicitly but clearly *mandate* that the injured beneficiaries be made whole.[23] The proper vehicle for seeking such recompense

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[22] The 1910, 1934 and 1964 Acts are in reality amendments to the General Allotment Act, see Cohen, *Handbook on Federal Indian Law* (1982 ed.) at 134 (the 1910 Act is "a major revision of the General Allotment Act)."

[23] It is, of course, well established that statutes enacted for the benefit of Indians are to be liberally construed in favor of the Indians and that doubtful expressions are to be resolved in the Indians' favor. *See Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 690 (1979); *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 174 (1973); *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930). Nor is this canon different when the Indian interests are in competition with those of the United States. *See Choctaw Nation v. United States*, 318 U.S. 423, 431-32 (1943); *Choate v. Trapp*, 224 U.S. 665, 675 (1912).

is an action for money damages, under 28 U.S.C. § 1491 (the Tucker Act) or § 1505 (the "Indian Tucker Act").

An examination of the federal Indian timber management statutes and regulations demonstrates conclusively that they necessarily do "confer a substantive right to recover money damages from the United States," *United States v. Testan*, *supra*, 424 U.S. at 398, else the Indians would be deprived of the monetary benefits mandated by Congress, including sale of their timber for a price commensurate with its worth and management of their timber on a sustained-yield basis.

The Secretary of the Interior was first authorized to sell timber from allotted Indian trust lands by the Act of June 25, 1910, § 7, 36 Stat. 855, 857, 25 U.S.C. § 406. That Act—which was amended in 1964 [24] to reiterate and emphasize the monetary nature of the Government's trust duties and the fact that those duties must be exercised in such a way as best to serve the "financial needs" of the timber's beneficial owners—reads today as follows:

> "The timber on any Indian land held under a trust or other patent containing restrictions on alienations may be sold by the owner or owners with the consent of the Secretary of the Interior, and the proceeds from such sales, after deductions for administrative expenses to the extent permissible under section 413 of this title shall be paid to the owner or owners *or disposed of for their benefit* under regulations to be prescribed by the Secretary of the Interior. It is the intention of Congress that a deduction for administrative expenses may be made in any case unless the deduction would violate a treaty obligation or amount to a taking of private property for public use without just compensation in violation of the fifth amendment to the Constitution. *Sales of timber under this subsection shall be based upon a consideration of the*

[24] Act of April 30, 1964, 78 Stat. 186, 25 U.S.C. § 406.

> *needs and best interests of the Indian owner and his heirs. The Secretary shall take into consideration,* among other things, (1) the state of growth of the timber and *the need for maintaining the productive capacity of the land for the benefit of the owner and his heirs,* (2) *the highest and best use of the land,* including the advisability and practicality of devoting it to other uses for the benefit of the owner and his heirs, and (3) *the present and future financial needs of the owner and his heirs.*"

25 U.S.C. § 406(a) (emphasis added). *See also* 25 U.S.C. § 407 (timber sales on unalloted trust lands).

Even in 1910, Congress was concerned that the Indians receive from their timber "whatever profit it is capable of yielding" (*White Mountain Apache Tribe v. Bracker, supra,* 448 U.S. at 147), and it knew that this could occur only if the timber resources were sold and managed in a prudent and proper manner. In passing the 1910 Act, Congress "presumed that there will be regulations under which the timber . . . will be cut," and it recognized that placing the management of the Indian timber sales in the hands of federal officials would "make it their duty" to "supervise its cutting in the Indian reservation[s]." 45 Cong. Rec. 6087-88 (1910).

The Interior Department itself recognized this duty—and its essentially monetary character—from the very beginning. In 1911, the Indian Service (the predecessor agency to the BIA) promulgated its first regulations under the 1910 Act, specifically recognizing that its duty under the statute carried with it the responsibility of

> "so managing the Indian forests as *to obtain the greatest revenue for the Indians* consistent with a proper protection and improvement of the forest." [25]

[25] Plaintiffs' Exhibit DT 3.3-1.1 (1911 regulations), at 4 (emphasis added). In treating the Indian Service's timber sale duties, those regulations addressed in detail such matters as size of sales,

The 1911 regulations were slightly revised in 1918, 1927 and 1936; today, they appear primarily in 25 C.F.R. Part 141. At all times, the BIA (and, before it, the Indian Service) has recognized that it is required by 25 U.S.C. §§ 406 and 407 to convert the Indian timber into income by selling it at a price equivalent to its worth and consistent with sound silvicultural techniques.

The Bureau's formal recognition of its duties, however, did not always translate into fulfillment of those duties and, by 1934, Congress saw the need to act with even greater specificity in order to assure the Indians the full prudent realization of monetary benefit from their timber resources.[26] By Section 6 of the Indian Reorganization Act, 25 U.S.C. § 466, Congress expressly directed that the Interior Department manage Indian forest resources "on the principle of sustained-yield management."

The need for such specific legislation was explained as follows:

> "The bill seeks, through Section 6, *to assure a proper and permanent management of the Indian forest and grazing lands and makes such management mandatory on the Secretary of the Interior* instead of optional, as at present. It seeks to prevent the destructive use of Indian forests and range lands. It di-

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contract forms and number of copies, advertisements and methods of billing, deposits and bonding requirements, contract approval procedures, methods of payment, time for cutting the timber, administrative fee deductions and expenses to be covered thereby, procedures for sales by minors, allowable heights of stumps, base and top diameters of trees for cutting, tree marking and scaling rules, percentage of trees to be left as a seed source, branding of logs, and slash disposal. *Id.* at 8-28.

[26] One Congressman referred to the relationship between the Indians and the Government as "a sacred trust," and said "The failure of their governmental guardian to conserve the Indians' land and assets and the consequent *loss of income or earning power*, has been the principal cause of the present plight of the Indian." 78 Cong. Rec. 11726 (1934), emphasis added.

> rects the Secretary of the Interior to place the Indian forests, comprising some 3,000,000 acres of highly valuable and productive timber land, on a basis of permanent sustained-yield management, which means that hereafter the annual cut of timber will be restricted to the annual growth capacity of the forest, with continuous reforestation as the cutting proceeds. *This will assure that the Indian forest will be permanently productive and will yield continuous revenue to the tribes.*" [27]

Commissioner of Indian Affairs John Collier testified in favor of the legislation, noting that

> "there must be a constructive handling of Indian timber. We have got to stop the slaughtering of Indian timber lands, to operate them on a perpetual yield basis and the bill *expressly directs that this principle of conservation shall be applied throughout.*" [28]

He again emphasized the mandatory nature of the statute later in his testimony, pointing out that: "The declaration that sustained-yield shall be practiced in the forest is very important. It is a direction." [29]

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[27] 78 Cong. Rec. 11730 (1934) (emphasis added). In fact, the 1934 statute enacted into law a congressional expectation which had been expressed at the time of the 1910 Act's passage. *See* 45 Cong. Rec. 6087-88 (1910) (*quoted* at page 21 *supra*). The sustained-yield principles apply to allotted lands as well as tribal, *see* 25 U.S.C. § 406 (Clause 1), and 25 C.F.R. §§ 141.1(b), 141.3(b) (1981), despite the Government's hint to the contrary, *see* Brief for the United States, at 34 n.29.

[28] *Hearings on H.R. 7902 Before the House Comm. on Indian Affairs*, 73d Cong., 2d Sess., pt. 2, at 35 (1934) (emphasis added).

[29] *Id.*, pt. 4, at 131. Commissioner Collier went on to discuss an earlier congressional attempt to apply the principle of sustained-yield management to the timber lands of the Menominee Tribe in Wisconsin. Unfortunately, the principle

> "was not followed by the Department. Much of their timber was devastated, and, as a result, they have a claim against the Government, an assertable and collectible claim, that they were protected by a specific direction from Congress that the timber

Regulations were first promulgated under the 1934 Act in 1936.[30] They required the preservation of Indian forest lands in a perpetually productive state; forbade the clear-cutting of large contiguous areas; required adequate provision for new growth when mature timber was removed; required the regulation of run-off and the minimization of erosion; called for the development of working plans for all reservations of major importance with a definite program for action for a specific period of time in the future; governed slash disposal; required the location and construction of logging roads so as to minimize erosion; and articulated the overriding congressional objective that the Indians receive "whatever profit [the forest] is capable of yielding."[31]

In other words, federal law directs not only *that* the Department of the Interior manage and sell allotted Indian timber resources and pay the proceeds to the beneficial Indian owners of those resources; it dictates also *to what end* the federal trustee is to act in fulfillment of its responsibilities. The substantive right of the respond-

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should be operated on a perpetual yield basis. The other Tribes are entitled to similar protection."

Id. The Menominees did, indeed, later prevail on their claim against the United States for the failure of the Interior Department to manage their forest on a sustained-yield basis. *See Menominee Tribe v. United States*, 117 Ct. Cl. 442 (1950). Of course, the Menominee claim required a special jurisdictional act because of tribal ineligibility to sue the United States in the absence of such an act, but, as noted below, Congress eliminated the necessity for special jurisdictional acts for tribal claims when it enacted the "Indian Tucker Act," 28 U.S.C. § 1505, in 1946. *See* notes 35-37 *infra* and accompanying text.

[30] *See* Plaintiffs' Exhibit DT 3.3-1.3 (BIA 1936 General Forest Regulations).

[31] *White Mountain Apache Tribe v. Bracker, supra*, 448 U.S. at 149. It was, of course, the BIA regulations which this Court quoted in *Bracker*. The regulations remain essentially unchanged today. *See* 25 C.F.R. Part 141 (1981)

ents to receive full payment for their timber resources properly managed is clear: They are entitled to receive "the benefit of whatever profit [the forest] is capable of yielding."

The Court must not be misled by the Government's attempt to characterize its duties under these statutes as something other than "essentially monetary" in character.[32] As noted above, the timber allotments owned by respondents herein *have no value* to the respondents apart from their capacity to generate revenues. The Congress, the Interior Department, and this Court have recognized this fact. The House Report which accompanied the 1910 timber sales Act, for example, expressly noted that:

> "[I]n many instances the timber is the only valuable part of the allotment or is the only source from which funds can be obtained for the support of the Indian or the improvement of his allotment."

H.R. Rep. No. 1135, 61st Cong., 2d Sess. 3 (1910). And, in a case dealing with the very timber lands here in question, this Court observed:

> "Once logged off, the land is of little value. The land no longer serves the purpose for which it was by treaty set aside to [the allottee's] ancestors, and for which it was allotted to him. It can no longer be adequate to his needs and serve the purpose of bringing him finally to a state of competency and independence. Unless the proceeds of the timber sale are preserved for the [allottee], he cannot go forward

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[32] *See* Brief for the United States, at 24-25 and n.18. The Government's contention that "the Court of Claims' decision rests upon the novel proposition that a statute that does not in terms create any right to payment of money nonetheless may support a damage action against the United States" (*id.* at 14) is also misleading. The timber management statutes and regulations upon which respondents' claims are founded *do* by their terms create a right to the payment of money. That much is express. Those statutes and regulations also require, by clear and necessary implication, that the money so paid must be the full monetary equivalent of the value of the timber.

> when declared competent with the necessary chance of economic survival in competition with others."

Squire v. Capoeman, 351 U.S. 1, 10 (1956). When the United States took from these Indians their tribal reservation lands, allotted them to individuals, and undertook to hold them in trust for the Indians' benefit, it did so knowing perfectly well that the only benefit to be realized by its cestuis was the *generation and payment of money*. The United States did not simply undertake generally to preserve those lands for use as a tribal or individual homestead or to preserve or develop the aesthetic or cultural value of the lands; it expressly assumed the responsibility of generating and paying *money* to the allottees and their heirs. The ultimate duty which the Government owes to the allottees is purely monetary in nature.

Again, this fact has been recognized by every branch of the federal government. Since 1911, the Department of the Interior has acknowledged its duty of

> "so managing the Indian forests as to obtain the greatest revenue for the Indians . . . ."

Plaintiffs' Exhibit DT 3.3-1.1 (1911 regulations) at 4. *See also* 25 C.F.R. § 141.3(a)(3) (1981). Similarly, when the Congress determined in 1934 to make sustained-yield management of Indian forests mandatory, it was explained that:

> "This will assure that the Indian forest will be permanently productive and will yield continuous revenue to the tribes."

78 Cong. Rec. 11730 (1934).[33] And, as recently as 1980, this Court itself emphasized the

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[33] The sustained-yield provision of the 1934 Act has been called "an undertaking by the Government to manage the land resources of Indian reservations for the *optimum economic benefit of the Indians*." *United States v. Anderson*, 625 F.2d 910, 915 (9th Cir. 1980), *cert. denied*, 450 U.S. 920 (1981) (emphasis added).

> "overriding federal objective of guaranteeing Indians that they will 'receive . . . the benefit of whatever profit [the forest] is capable of yielding . . . .'"

White Mountain Apache Tribe v. Bracker, *supra*, 448 U.S. at 149.[34]

The federal timber management statutes and regulations clearly—indeed, by their very terms—contemplate that the Indian timber resources will be properly managed and *converted into cash income* for their Indian owners. This being the case, it is inconceivable that the Congress could have intended that the federal government —a well compensated trustee—may negligently sell Indian timber below its fair market value and otherwise mismanage Indian timber without being required to restore the full monetary value lost by the Indians as a result of such mismanagement.

In fact, the contrary is true. In 1946, Congress enacted the "Indian Tucker Act," 28 U.S.C. § 1505, an Act enabling Indian tribes to sue the United States for damages on any claim which "would be cognizable in the Court of Claims if the claimant were not an Indian tribe, band or group."[35] The House sponsor of the bill, Con-

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[34] *See also Squire v. Capoeman*, *supra*, 351 U.S. at 10: *"Unless the proceeds of the timber sale are preserved for respondent, he cannot go forward when declared competent with the necessary chance of economic survival in competition with others.* This chance is guaranteed by the tax exemption afforded by the General Allotment Act, and the solemn undertaking in the patent. *It is unreasonable to infer that, in enacting the income tax law, Congress intended to limit or undermine the Government's undertaking.* To tax respondent under these circumstances would, in the words of the court below, be 'at the least, a sorry breach of faith with these Indians.'" (Emphasis added.)

It would seem an equally "sorry breach" for the Government to fail to make good the losses it caused to the Indians' property by its own mismanagement.

[35] The text of 28 U.S.C. § 1505 is set forth at page 2 of this Brief. Sec. 1505 is applicable not only to tribes, such as plaintiff Quinault Tribe, but to "identifiable groups," which would include the individ-

gressman Henry M. Jackson of Washington, clearly supposed that his bill permitted the maintenance of claims for trust mismanagement. He said:

> "The Interior Department itself suggested that it ought not be in a position where its employees can mishandle funds and lands of a national trusteeship without complete accountability . . . . [L]et us see that the Indians have their fair day in court so that they can call the various Government agencies to account on the obligations that the Federal Government assumed." [36]

The House Report expressed the same congressional purpose even more forcefully:

> "If we fail to meet these obligations by denying access to the courts when trust funds have been improperly dissipated or other fiduciary duties have been violated, we compromise the national honor of the United States." [37]

Apparently, the Justice Department does not agree with Congress that it compromises the nation's honor when it seeks to deny these Indians "access to the courts" when they allege that their trust assets "have been improperly dissipated." Congress clearly contemplated that claimants such as the respondents here would be given "their fair day in court," and this Court should see to it that they get exactly that.

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ual allottees of the Quinault Reservation, who are the individual plaintiffs herein. The latter would thus qualify under either § 1491 or § 1505.

[36] 92 Cong. Rec. 5312 (1946). *See also* 92 Cong. Rec. 5313 (1946), where Congressman Jackson urged passage of the bill, "so it will never again be necessary to pass special Indian jurisdictional acts in order to permit the Indians to secure a court adjudication on any misappropriations of Indian funds or of any other Indian property by Federal officials that might occur in the future."

[37] H.R. Rep. No. 1466, 79th Cong., 1st Sess. 4 (1945), *reprinted in* 1946 *U.S. Code Cong. & Ad. News* 1347, 1351.

III. Congressional establishment of express trust relationships between the United States and the respondents constituted a waiver of sovereign immunity from suit for money damages in the event of the United States' breach of its trust duties.

Independently of the foregoing arguments: where the Congress purposefully creates a trust relationship with an Indian or an Indian tribe—as it did implicitly in the Treaty of Olympia and expressly in the General Allotment Act of 1887—and clothes that trust with specific property management duties—as it did in the 1910, 1934 and 1964 timber sales and management statutes—it creates an undertaking that by necessary implication includes as one of its incidents the liability to restore any losses the Government improperly causes to the trust res. Respondents in this case are all beneficiaries of express trusts specifically naming them as beneficiaries. *See, e.g., Squire v. Capoeman, supra*, 351 U.S. at 4 n.6 (text of individual trust patent issued on the Quinault Reservation pursuant to the General Allotment Act of 1887); Treaty of Olympia, 12 Stat. 971 (creating trust relationship between the United States and the Quinault Tribe). *See generally* notes 4-5 *supra* and accompanying text. The right to restoration of value in the event of the Government's breach of the terms of such an express trust is a substantive right necessarily conferred by the statutes and other instruments creating and defining the trust, and is therefore cognizable under the Tucker Act and the Indian Tucker Act.

In this context, an express trust is indistinguishable from—and, indeed, constitutes—an express contract.[38] Just as there is no need for a federal government contract to spell out expressly that the Government may be

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[38] The fact that a contractual relationship exists between the United States and the respondents and the fact that respondents' claims are, in fact, based on the Government's breach of contract are addressed in Section V of the Argument herein. *See* pages 37-42 *infra*.

sued in damages for breach of the contract—since, without such liability, the contract is no contract at all—so, too, it is unnecessary for an express trust instrument to spell out that the Government may be sued in damages for breaches of its terms. Indeed, it is fundamental that "no trust is created unless [the settlor] manifests an intention to impose duties which are enforceable in the courts." *See Restatement (Second) of Trusts* § 25 (1959). *See also id.* § 205. And, as Justice White noted in his dissent in *Mitchell I*:

> "Such liability . . . follows naturally from the existence of a trust and of fiduciary duties. It is hornbook law that the trustee is accountable in damages for breaches of trust. See Restatement §§ 205-212; Bogert § 862; 3 Scott § 205."

445 U.S. at 550. (The majority of the Court in *Mitchell I* did not disagree with this analysis, but concluded that the General Allotment Act, standing alone, had imposed no fiduciary management duties upon which such liability could be based. *See* note 13 *supra*.)

The Court of Claims has recognized since the question first arose in 1966 that the existence of a trust relationship between the United States and an Indian or Indian tribe includes as a fundamental incident the right of an injured beneficiary to sue the trustee for breach of the trust. *See Klamath & Modoc Tribes v. United States*, 174 Ct. Cl. 483 (1966); *Navajo Tribe v. United States*, 364 F.2d 320 (Ct. Cl. 1966); *Fields v. United States*, 423 F.2d 380 (Ct. Cl. 1970); *Hebah v. United States*, 428 F.2d 1334 (Ct. Cl. 1970); *Capoeman v. United States*, 440 F.2d 1002 (Ct. Cl. 1971); *Quinault Allottee Ass'n v. United States*, 453 F.2d 1272 (Ct. Cl. 1972); *Quinault Allottee Ass'n v. United States*, 485 F.2d 1391 (Ct. Cl. 1973), *cert. denied*, 416 U.S. 961 (1974); *Mason v. United States*, 461 F.2d 1364 (Ct. Cl. 1972), *rev'd on other grounds*, 412 U.S. 391 (1973); *Cheyenne-Arapaho Tribes v. United States*, 512 F.2d 1390 (Ct. Cl. 1975);

Coast Indian Community v. United States, 550 F.2d 639 (Ct. Cl. 1977).[39]

Other courts have also so ruled. *See Moose v. United States*, 674 F.2d 1277 (9th Cir. 1982); *Whiskers v. United States*, 600 F.2d 1332 (10th Cir. 1979), *cert. denied*, 444 U.S. 1078 (1980); *Smith v. United States*, 515 F. Supp. 56 (N.D. Cal. 1978) (Sweigert, D.J.); *Manchester Band of Pomo Indians, Inc. v. United States*, 363 F. Supp. 1238 (N.D. Cal. 1973) (Renfrew, D.J.).

In the *Moose* case, the court ruled that the Southern Paiute Distribution Act, Public Law No. 90-584, 82 Stat. 1147, created a trust relationship between the United States and certain Indian children with respect to judgment funds awarded them in 1965. 674 F.2d at 1281, 1283. It also held—as we argued below in this case—that 25 U.S.C. §§ 161a and 162a "impose specific obligations on the United States with respect to funds that it holds in trust for Indians." *Id.* at 1280.[40] This being the

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[39] In none of the decisions cited did the Court of Claims consider the effect of *Testan* on the jurisdictional question, but of course it did so in its two *Mitchell* decisions below, and in *Duncan v. United States*, 667 F.2d 36 (Ct. Cl. 1981), *cert. granted*, No. 81-1747, wherein it also found jurisdiction.

[40] Although the Government acknowledges that "[t]he evident purpose of [25 U.S.C.] Section 162a is to provide the Secretary with authority to put Indian funds to uses more remunerative than the 4% rate prescribed by 25 U.S.C. § 161a," it denies that the Secretary's failure to do so is actionable. *See* Brief for the United States, at 39 n.32. Several courts have ruled to the contrary, holding that it is an actionable breach of trust for the Secretary, acting as trustee, to leave Indian money in his possession idle, or paying a low rate of interest, when, under 25 U.S.C. § 162a, he could readily have invested the same money in federally guaranteed obligations paying high rates of interest. *See Moose v. United States*, *supra*, 674 F.2d at 1280-83; *Cheyenne-Arapaho Tribes v. United States*, 512 F.2d 1390, 1394 (Ct. Cl. 1975); *Menominee Tribe v. United States*, 59 F. Supp. 137 (Ct. Cl. 1945) (Government held liable for withdrawing Indian trust funds from an account earning 5% inter-

case, the court said, it had jurisdiction under the Tucker Act to entertain the plaintiffs' claims for money damages incurred as a result of the Government's breach of those obligations. The court discussed *Testan* (*id.* at 1280), distinguished *Mitchell I* (on the same grounds we have advanced herein, that the General Allotment Act imposed no duties of the kind sued upon) (*id.* at 1283 and n.16), and concluded

> "that the United States holds the minors' portion of the Southern Paiute judgment fund in trust for the minors, and consequently that the United States has waived sovereign immunity with respect to claims for damages for breach of that trust."

Id. at 1283. One judge argued in dissent that the Southern Paiute Distribution Act had not created a trust relationship; he agreed, however, with the majority that a "declaration of trust status is *ipso facto*, a waiver of sovereign immunity." *Id.* at 1284 (Halbert, D.J., concurring and dissenting).

In the *Whiskers* case, the court said:

> "At the outset we express our full agreement with [the Indians'] contention that a legislative declaration of trust status for a particular fund is itself a congressional mandate, fully consistent with the *Testan-Eastport* standard discussed above, that the United States assume financial responsibility for its failure adequately to perform its fiduciary obligations. Liability on the part of a trustee for breach of his fiduciary duties is inherent in a trust relationship."

600 F.2d at 1335.

Thus, four post-*Testan* courts (the Court of Claims, the Courts of Appeals for the Ninth and Tenth Circuits,

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est and repaying them to an account earning only 4% interest); *Manchester Band of Pomo Indians, Inc. v. United States*, 363 F. Supp. 1238, 1243-48 (N.D. Cal. 1973). *See also* note 43 *infra*.

and the District Court for the Northern District of California) have concluded that *Testan* does *not* preclude Indian breach of trust suits against the United States under the Tucker Act.

In the instant case, there can be no dispute about the creation and continued existence of an express trust relationship between the United States and each of the respondents. Those relationships—and the statutes, regulations and patents creating and setting forth the terms thereof—give rise, in and of themselves, to a substantive right to redress for breaches of their terms. What may initially have been a limited, even empty, trust with no duties imposed upon the trustee by the 1887 General Allotment Act (*see Mitchell I, supra*, 445 U.S. at 542) has been expressly and thoroughly augmented and defined by the federal timber management statutes and regulations to impose clear and specific management duties upon the federal trustee. From those fiduciary duties flow the clear substantive right of monetary compensation for losses incurred by the trust beneficiaries as the result of violations thereof. And, as this Court has ruled, where such a substantive right exists, the Court of Claims has jurisdiction to adjudicate claims for monetary damages based thereon. *See Mitchell I, supra*, 445 U.S. at 538; *Testan v. United States, supra*, 424 U.S. at 398; *Eastport S.S. Corp. v. United States, supra*, 372 F.2d at 1007-09.[41]

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[41] Lest the Court be concerned that, if these respondents are allowed to sue, the courts will be flooded with Indian damage actions alleging breach of trust, we would note that the trend in Indian affairs is toward greater tribal autonomy in the control of tribal property, and away from comprehensive Government supervision and control. *See, e.g.*, Indian Self-Determination Act of 1975, 25 U.S.C. §§ 450-458c; Indian Financing Act of 1974, 25 U.S.C. §§ 1451-1543. It is also fair to note, in defense of the Government, that the problems on the Quinault Reservation are not typical of BIA-managed forests; and also that since the filing of this suit the BIA has improved its management practices considerably on the Quinault Reservation.

IV. Respondents' claims are the equivalent of claims for "money improperly exacted or retained" for purposes of the Tucker Act, 28 U.S.C. § 1491, and the Indian Tucker Act, 28 U.S.C. § 1505.

Respondents have yet another basis for jurisdiction independent of the foregoing. In *Eastport S.S. Corp. v. United States, supra*, the Court of Claims observed that

> "claims we consider under Section 1491 can be divided into two somewhat overlapping classes—[1] those in which the plaintiff has paid money over to the Government, directly or in effect, and seeks return of all or part of that sum; and [2] those demands in which money has not been paid but the plaintiff asserts that he is nevertheless entitled to a payment from the treasury. In the first group (where money *or property* [emphasis added] has been paid or taken), the claim must assert that the value sued for was improperly paid, exacted, or taken from the claimant in contravention of the Constitution, a statute, or a regulation. In the second group, where no such payment has been made, the allegation must be that the particular provision of law relied upon grants the claimant, expressly or by implication, a right to be paid a certain sum. *See South Puerto Rico Sugar Co. Trading Corp. v. United States*, 334 F.2d 622, 626-627, 167 Ct. Cl. 236, 244-245 (1964), *cert. denied*, 379 U.S. 964 (1965)."

372 F.2d at 1007. This Court approvingly acknowledged this analysis in *Testan*. *See* 424 U.S. at 398-400.

Because the Court of Claims concluded below that the federal Indian timber management statutes and regulations provide a sufficient basis for its exercise of jurisdiction over the instant case, the arguments set forth in the preceding sections of this Brief have focused upon the "second" class of cases over which the Court of Claims may exercise its Tucker Act jurisdiction. In fact, this case demonstrates that those "classes" are, indeed, at times "overlapping," for it falls equally into the "first" class of Tucker Act cases—cases involving claims for

"money or property" paid to or taken by the Government. In this first class of cases, of course, a claimant need not demonstrate that any constitutional provision, statute or regulation independently gives rise to a substantive right to the payment of money or "fairly mandates compensation." It is enough for jurisdictional purposes that the Government obtained his money or property and that he demands its return. *United States v. Testan*, *supra*, 424 U.S. at 401; *Eastport S.S. Corp. v. United States*, *supra*, 372 F.2d at 1007.

We submit that, when the Government, acting pursuant to congressional authority, takes possession of (or assumes complete control over) an Indian's trust property and, in the exercise of such control, sells the property for less than its value, or otherwise improperly causes loss or waste of that property, the occurrence of the loss is the equivalent of the Government's improperly "tak-[ing] from" the cestui, and the Government may be sued under the Tucker Act (or, in the case of tribal claims, the Indian Tucker Act) for such loss.[42] Having taken the

[42] In *Shoshone Tribe v. United States*, 299 U.S. 476, 497-98 (1937), this Court observed that:

> "Power to control the property and affairs of Indians in good faith for their betterment and welfare may be executed in many ways and at times even in derogation of the provision of a treaty. *Lone Wolf v. Hitchcock*, 187 U.S. 553, 564, 565, 566. The power does not extend so far as to enable the Government 'to give the tribal lands to others; or to appropriate them to its own purposes, without rendering or assuming an obligation to render just compensation . . .; for that "would not be an exercise of guardianship, but an act of confiscation." ' *United States v. Creek Nation*, [295 U.S. 103,] 110; citing *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110, 113; *Cherokee Nation v. Hitchcock*, 187 U.S. 294, 307-308 . . . . Spoliation is not management."

In the instant case, of course, the United States took possession of the respondents' property, as trustee—a trusteeship undertaken partly in exchange for making the Indians' land available for settlement by non-Indians (see note 52 below) and partly to establish a means for the training and education of the Indians themselves, as a matter of national policy, in order that they might one day be able to take their places as fully participating members of

respondents' timber property in trust—and having expressly undertaken the fiduciary duty of converting that property into cash and paying that cash to the respondents—the Government should not now be heard to argue that its possession and waste of the trust *res* does not constitute the equivalent of "exaction or retention" of respondents' property for purposes of fitting within the first class of jurisdictional cases.

Nor is it relevant that some of the respondents' claims herein seek recompense for *property* (rather than money)[43] improperly exacted or retained. *See Eastport*

American society. When, during the term of the trust, the actions of the Government—including sale of trust property to third persons for less than its full monetary equivalent—causes losses of that trust property and diminution of its value, it is hard to distinguish the case from one involving "confiscation" for which the victim is entitled to just compensation. *See Shoshone Tribe v. United States*, *supra*, 299 U.S. at 497-98; *United States v. Creek Nation*, *supra*, 295 U.S. at 109-10; *United States v. Sioux Nation*, 448 U.S. 371, 407-24 (1980); *United States v. Klamath and Modoc Tribes*, 304 U.S. 119, 123 (1938); *Chippewa Indians v. United States*, 301 U.S. 358, 375-76 (1937); *Three Affiliated Tribes v. United States*, 390 F.2d 686, 693-95 (Ct. Cl. 1968).

[43] Several of respondents' claims—such as the one which seeks redress for the Government's exaction of excessive administrative fees—literally *are* claims "for money improperly exacted or retained."

The Government's attempt to distinguish between a failure to pay over interest "actually earned" and a failure to invest the Indians' trust funds in a reasonably remunerative manner (*see* Brief for the United States, at 38-39) does not withstand analysis. When the Government leaves the Indians' trust money in a 4% Treasury account, it is able to use—and it does use—that money for its own purposes while paying only 4% interest thereon; and, when the prevailing rates for Government obligations are higher than 4%, the Government makes a *profit* by leaving the Indians' money in the 4% fund. Respondents submit that it is entirely reasonable to characterize the profit realized by the Government as belonging to the Indians' trust fund and, thus, to say that the Indians' claims are, in effect, claims for the return of their own money.

In fact, in some respects, the Government's failure to obtain fair market value for timber sold is itself an "exaction" of the Indians'

S.S. Corp. v. United States, *supra*, 372 F.2d at 1007. Indeed, at least three of the cases cited in *Eastport* as examples of this class of noncontractual Tucker Act cases involved the Government's exaction, retention or loss of *property* (not money) owned by the claimants. *See Rough Diamond Co. v. United States*, 351 F.2d 636 (Ct. Cl. 1965), *cert. denied*, 383 U.S. 957 (1966) (petition dismissed by Court of Claims on its merits); *Zavodny v. United States*, 152 F. Supp. 432 (Ct. Cl. 1957) (judgment awarded for Government's loss of property belonging to claimant); *Gmo. Niehaus & Co. v. United States*, 153 F. Supp. 428 (Ct. Cl. 1957) (denial of motion to dismiss, on jurisdictional grounds, claim for the value of property seized under the Trading with the Enemy Act).

V. Respondents' claims are based upon express and implied contracts which they allege have been breached by the United States.

A. Many of the statutes and regulations imposing timber and money management duties upon the Government were incorporated into express contracts between the Government and the respondents herein.

Many of the timber management statutes and regulations relied upon by the Court of Claims in finding jurisdiction in this case have been effectively incorporated into *express contracts* between the BIA and the Indian owners

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money. When, for example, the reason for failure to obtain fair market value is that the Government allows excessive road costs to logging companies, thus reducing the timber proceeds paid to the Indians, the excessive costs so allowed represent money to which the Indians are entitled. While the money ultimately goes to the logging company and not to the Government, it does so at the Government's behest; as far the Indians are concerned, they are indeed suing for return of their money improperly "exacted" by the Government. The Government concedes as much in its brief. *See* Brief for the United States, at 37 n.31 ("Like claims for excessive administration fees, respondents' claim for deduction of road building fees may be maintainable on the theory that recovery of funds unlawfully retained is sought.").

of the timber and, thus, respondents' claims present no jurisdictional problem at all. Pursuant to those contracts, the BIA agreed to act, in accordance with the applicable statutes and regulations, as the Indians' *paid agent* in the supervision of logging and in the sale of the Indians' timber.

These express agency contracts are set forth in the individual powers of attorney procured by the BIA from the Indian owners prior to sale of a large block of timber. Each power of attorney stated: [44]

> "KNOW ALL MEN BY THESE PRESENTS, that I the undersigned, hereby request, authorize, and empower the Superintendent of the Taholah Indian Agency to enter into contract for the sale of the timber upon the following described lands . . . and *authorize him to perform every act necessary and requisite to the consummation of such sale* with the same validity as if I were personally present . . . .
>
> "I furthermore agree that the proceeds arising from the sale of this timber may be disposed of in accordance with the regulations of the Department of the Interior, *including those providing for the payment of the cost of administration.*"

The power "to perform every act necessary and requisite to the consummation of such sale," of course, embraced not only the power and responsibility of entering into a timber sale contract with a logger, but also of administering every aspect of that contract [45] until the land was finally cleared and rehabilitated.[46]

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[44] Plaintiffs' Ex. DT 3.6-4. A copy of the power of attorney form used by the BIA in these instances is reproduced as Appendix A to this Brief.

[45] Administering the contract includes supervising the logging, collecting the money, enforcing the BIA regulations and other contract provisions, and applying the price-change formula. *See* note 7 *supra*; note 48 *infra*.

[46] The powers of attorney are construed by the BIA as conferring very broad powers. For example, the BIA has interpreted

Pursuant to the powers of attorney, the BIA entered into master timber sales contracts, "for and in behalf of the Indian owners," [47] whereby the loggers agreed to buy the timber and log it under BIA supervision. The contracts expressly incorporated the detailed BIA regulations.[48]

The Indian owner was contractually entitled not only to the performance of this contract by the logger, but, through the power of attorney, to proper BIA supervision of the logger and proper execution of all of the contract's terms. After all, the Indian owner was required to pay a substantial administrative fee for that supervision.

In other words, if the BIA failed to supervise the timber sale contract properly, it breached its express agency

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them as authorizing it to modify the logging contracts throughout their long life, without further consent of the allottee. When an allottee dies during the term of a logging contract, the BIA still administers the contract with respect to the allotment(s) concerned, whether or not the allottee's heirs sign powers of attorney.

[47] The "Crane Creek" master contract is reproduced hereto as Appendix B to this Brief.

[48] Under the contract, the logger agreed to cut the timber under detailed BIA supervision. For example, the contract provided that the logger would pay prices determined by a formula administered by the BIA (Appendix B, ¶¶ 8, 9 and 10); would cut a certain volume each year unless relieved by the BIA (*id.* ¶¶ 15 and 16); would submit an annual logging plan to the BIA for approval (*id.* ¶ 22); and would submit financial statements to the BIA (*id.* ¶ 26).

Under the incorporated timber regulations, the BIA was, *inter alia*, to assign a supervisor and a log scaler (*id.* ¶¶ 2 and 3); the BIA could reserve from logging scenic strips along roads and streams (*id.* ¶ 10); construction of camps, sawmills, roads, bridges, etc. was subject to BIA regulation (*id.* ¶ 39); the BIA could inspect the logger's records (*id.* ¶ 51); and the BIA could suspend operations of the logger for violation of the contract or regulations (*id.* ¶ 52).

contracts with the Indian owners.[49] Many of the wrongs complained of by the respondents herein arise from the failure of the BIA to supervise the contracts properly—*e.g.*, failure to fix an adequate price under the timber sales contract's price adjustment mechanism; failure to see that all of the logs were scaled properly; failure to require the logger to rehabilitate the land after logging, thus preventing reforestation.[50] These failures are breaches of the express agency contracts with the Indian owners, and the Court of Claims clearly has jurisdiction to entertain claims against the United States for its breach of contract. *See* 28 U.S.C. §§ 1491, 1505.

In addition to timber sale supervision, the powers also covered disposition of the timber sale proceeds in accordance with BIA regulations. This gave the Indian owners the *contractual* right to have their timber proceeds properly handled by the BIA and, if the proceeds were not properly handled under the applicable regulations, there was a breach of the express agency contract. Again, such claims are clearly within the Tucker Act and Indian Tucker Act jurisdiction of the Court of Claims.

B. All of respondents' claims are based upon implied contracts cognizable under the Tucker Act, 28 U.S.C. § 1491, and the Indian Tucker Act, 28 U.S.C. § 1505.

The Court of Claims has jurisdiction under the Tucker Act, 28 U.S.C. § 1491, and the Indian Tucker Act, 28 U.S.C. § 1505, to award damages for breaches of implied-in-fact contracts, and there is no consent-to-sue problem

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[49] A principal may sue his agent for breach of contract when the agent fails to properly carry out his duties or mishandles the principal's property. *Restatement (Second) of Agency* §§ 400-402 (1958) ("If a paid agent does something wrongful, . . . acting negligently, the principal may have either an action of tort or an action of contract." *Id.* at 238.).

[50] Some of respondents' claims might not be deemed to arise from the express agency contract—*e.g.*, takings of rights-of-way without compensation.

in such situations. *United States v. Minnesota Mut. Inv. Co.*, 271 U.S. 212, 217 (1926). In such cases, the claimant need only prove that a contract was implied from the

> ". . . conduct of the parties showing, in the light of the surrounding circumstances, their tacit understanding."

Baltimore and Ohio R.R. v. United States, 261 U.S. 592, 597 (1923); *Cities Service Gas Co. v. United States*, 500 F.2d 448, 451-52 (Ct. Cl. 1974).

If there is any doubt that the powers of attorney and the timber contracts discussed in the previous section created express contracts upon which jurisdiction can be based (and we submit there should not be any doubt), it is absolutely clear that the respondents' claims are cognizable under an implied contract theory.

The Government, pursuant to its own statutes and regulations, and the terms of the contracts it drew up between the Indians and the loggers, has undertaken to control and administer in detail every aspect of the management and sale of the Indians' timber. In return for these services the Government has, as authorized by statute, regulation and power of attorney, charged the Indians an administrative fee.[51]

We submit that, when the Government undertakes to provide management services, for which the allottees will pay substantial fees, there is a tacit understanding by

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[51] The fee exacted is so large, incidentally, that it has produced revenues for the Government that substantially exceed the cost of the services provided. Refund of the excess is sought by one of respondents' claims. The respondents' challenge to the lawfulness of the fees (as opposed to their reasonableness) was rejected by the Court of Claims in *Quinault Allottee Ass'n v. United States*, 485 F.2d 1391 (Ct. Cl. 1973), *cert. denied*, 416 U.S. 961 (1974).

both parties—*i.e.*, there is an implied contract—that these services will be performed, and performed properly. If they are not, the allottees may sue on the implied contract under the Tucker Act and the Indian Tucker Act.[52]

CONCLUSION

For the foregoing reasons, the decision of the Court of Claims should be affirmed.

Respectfully submitted,

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JERRY C. STRAUS
Of Counsel

November 8, 1982

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[52] The implied contract is supported not only by substantial fees, but also by the fact that the services being performed by the Government are part of its obligations arising out of the Indians' cession of their land to the Government and agreement to accept allotments. *See* President Nixon's Message to Congress, July 8, 1970, *reprinted at* 116 Cong. Rec. 23258 (1970) ("The special relationship between Indians and the Federal government is [not an act of generosity, but] the result instead of solemn obligations which have been entered into by the United States Government."). *See also Morrow v. United States*, 243 Fed. 854, 857 (8th Cir. 1917) (holding that where Indians consented to relinquish their lands and accept trust allotments, there was "a valid contract" between the Government and the Indians); *United States v. Ferry County*, 24 F. Supp. 399, 400 (E.D. Wash. 1938) ("This [allotment] is an express trust for valuable consideration, to the faithful performance of which the United States was legally committed.").

APPENDIX A

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF INDIAN AFFAIRS

POWER OF ATTORNEY FOR SALE OF ALLOTMENT TIMBER

.....INDIAN RESERVATION, ...
(State)

KNOW ALL MEN BY THESE PRESENTS, that ..... *the undersigned, hereby request, authorize,*
(I or we)
and empower the Superintendent of the ..... *Indian Agency to enter into*
contract for the sale of the timber upon the following-described lands: .....
(Description of land)
.....
.....
the same being the allotment of .....
.....
..... *allottee No.* ....., *and authorize him to perform every act*
(Name of reservation)
necessary and requisite to the consummation of such sale with the same validity as if ..... *were*
(I or we)
personally present. Provided that no such contract shall be made hereunder at stumpage rates per thousand feet board measure of less than the following .....
(Specify rates for different species)
.....
.....
.....
.....

and ..... *do also hereby agree to grant any contractor holding any contract hereunder and in con-*
(I or we)
formity herewith, reasonable right-of-way over the above-described lands, or any other lands in which ..... *hold any interest, provided* ..... *shall receive reasonable compensation for any damage done*
(I or we) (I or we)
or incurred through such right-of-way. The Commissioner of Indian Affairs or his representative shall definitely determine what shall be considered reasonable damages.

..... *furthermore agree that the proceeds arising from the sale of this timber may be disposed*
(I or we)
of in accordance with the regulations of the Department of the Interior, including those providing for the payment of the cost of administration.

Place .....; .....
(Date)

Date .....,

Witnesses:

.....
.....
.....
.....
.....
.....

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APPENDIX B

UNITED STATES
DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS

Contract No. I-101-Ind-1302

TIMBER CONTRACT

CRANE CREEK LOGGING UNIT

1. THIS AGREEMENT, made and entered into at the Western Washington Indian Agency, Everett, Washington under authority of the Act of June 25, 1910 (36 Stat. 857; 25 USC 406, 407) between the Superintendent of the Western Washington Indian Agency, hereinafter called the Superintendent, for and in behalf of the Indian owners, party of the first part; and Raymond Incorporated of Seattle, Washington, hereinafter called the Purchaser, party of the second part.

2. WITNESSETH, that the Superintendent in consideration of the agreements by the Purchaser, agrees to sell to the Purchaser, and the Purchaser agrees to buy upon the terms and conditions herein stated, and the Indian Bureau General Timber Sale Regulations, approved April 10, 1920, by the Assistant Secretary of the Interior, which are attached to and made a part of this contract, all the merchantable dead timber, standing or fallen, and all the merchantable live timber, marked or otherwise designated by the officer in charge for selective logging, as required by said General Timber Sale Regulations, located on unallotted land, and on trust allotments covered by contracts entered into pursuant to the terms hereof, within a tract designated as the Crane Creek Logging Unit on the Quinaielt Indian Reservation. The boundaries of the unit, which shall be marked on the ground, are shown approximately on the attached map which is made a part hereof, and are described approximately as follows:

> Starting at a point on the northern Boundary of the Quinaielt Indian Reservation where the range line between Range 10 West and Range 11 West intersects said boundary, thence south along this range line to the North bank of the Quinaielt River, thence southwesterly along the Quinaielt River to a point 1/4 mile south of the center of Section 22, T. 22 N., R. 11 W., thence west along the south line of Indian Allotment No. 261 to the southwest 1/16 corner of said Section 22, thence North 1/4 mile to the quarter corner between Sections 21 and 22, thence West to the Quinaielt River, thence westerly along the north bank of the River to the approximate quarter corner between Sections 20 and 21, thence west to a point 1/4 mile east of the center of Section 19, thence north 1/4 mile, thence west to the range line between Ranges 11 and 12 West, thence north along the range line to the Township Corner common to T. 22 N., R. 12 W., T. 23 N., R. 12 W., T. 22 N., R. 11 W., and T. 23 N., R. 11 W., W.M., Thence West one mile, thence north to the North boundary of the Quinaielt Reservation, thence easterly along said boundary to the point of beginning.

3. THE SUPERINTENDENT AUTHORIZES THE PURCHASER, and the Purchaser obligates himself to enter into separate contracts on an approved form with such Indians holding trust patented allotments within the logging unit as desire to sell their timber, subject to the terms of this contract. THE PURCHASER FURTHER AGREES to enter into said allotment contracts within thirty days from the date of submission of such contracts to him by the Superintendent.

BIA HOQUIAM WA

Microfilm # 117-4436

EXHIBIT [illegible] 6.0.2-21
U.S. [illegible]
FILED [illegible]
NOS. 772-21, 773-21, 774-21, 775-21

4. THE APPROXIMATE AREA of the logging unit, exclusive of alienated land, is:

	Timbered land Acres
Unallotted land	166
Allotted land	35,216
Total	35,382

The Purchaser acquires no rights or interest whatsoever in and to approximately 440 acres of alienated land lying within the boundaries of this logging unit.

5. THE ESTIMATED VOLUME OF TIMBER TO BE CUT IS:

Species	Unallotted	Allotted	Total
Western red cedar	2,200,000	327,800,000	330,000,000 ft.BM
Sitka spruce	- - - -	16,000,000 " "	16,000,000 " "
Douglas fir	100,000	9,900,000 " "	10,000,000 " "
Amabilis fir	300,000	85,700,000 " "	86,000,000 " "
Western white pine	- - - -	7,000,000 " "	7,000,000 " "
Western hemlock and other species	500,000	164,500,000 " "	165,000,000 " "
Total	3,100,000	610,900,000 " "	614,000,000 " "
Cedar Poles	13,000	1,307,000	1,320,000 lineal ft.

It is mutually agreed that the foregoing are estimates only, and they shall not be construed as guarantees or limitations of the volumes of the several species of timber to be marked or otherwise designated for cutting under the terms of this contract. The actual volume of timber marked or otherwise designated for cutting shall be controlling, regardless of whether it is less or more than the above estimates.

6. FOR AND IN CONSIDERATION of the agreements by the Superintendent, the Purchaser agrees that prior to April 1, 1986 he will cut all timber covered by this contract, and will pay to the Indian Bureau Special Disbursing Agent for the Western Washington Indian Agency, hereinafter called the Special Disbursing Agent, for the use and benefit of the Indians entitled thereto, the full value of said timber as shall be determined on the basis of an actual log scale, at fixed rates per thousand feet, board measure, Scribner Decimal C Log Scale for saw timber which rates shall be established for each quarterly period beginning January 1, April 1, July 1, and October 1; PROVIDED, that the rates for the remainder of the quarterly period in which this contract is approved shall be the bid rates, as follows:

For western red cedar Thirteen dollars and 20 cents
For Sitka spruce Two dollars and 80 cents
For Douglas fir Fifteen dollars and 00 cents
For amabilis fir Six dollars and 60 cents
For western white pine Eight dollars and 50 cents
For western hemlock and other species Six dollars and 40 cents
For cedar poles with not greater than 9" top diameter and no more than 18" butt diameter the initial rate shall be the bid rate of .045 cents per lineal foot.

7. FOR THE PURPOSE of determining the stumpage rates to be paid for saw logs in each succeeding quarterly period of this contract it is understood and agreed that the Bureau of Indian Affairs has calculated, for each species, from information published by the Pacific Northwest Loggers Association, the grade percentages of logs sold in the combined Grays Harbor-Puget Sound-Columbia River log markets during the five calendar years of 1946 to 1950 inclusive, excepting cedar which is calculated on a three-year average for the years 1948 to 1950 inclusive. It is further agreed that the Bureau of Indian Affairs has calculated, for each species, the average log grade prices in the same combined markets for the months of July, August, and September, 1951 from information published by the Pacific Northwest Loggers Association; and from the aforesaid calculations has determined the weighted average prices of logs for the months of July, August, and September, 1951 to be:

Western red cedar	$56.74 per M ft. BM
Sitka spruce	$51.05 per M ft. BM
Douglas fir	$65.45 per M ft. BM
Amabilis fir	$41.47 per M ft. BM
Western white pine	$53.29 per M ft. BM
Western hemlock	$39.61 per M ft. BM

A schedule of the aforesaid calculations and determination is on file at the Portland Area Office of the Bureau of Indian Affairs.

8. IT IS FURTHER AGREED That the stumpage rates for sawtimber appearing in Section 6 of this contract bear the following percentage relationships to the weighted average log prices appearing in Section 7 hereof:

Western red cedar stumpage to western red cedar log price	10.44 %
Sitka spruce stumpage to Sitka spruce log price	21.15 %
Douglas fir stumpage to Douglas fir log price	22.72 %
Amabilis fir stumpage to amabilis fir log price	18.04 %
Western white pine stumpage to Western white pine log price	15.71 %
Western hemlock stumpage to western hemlock log price	16.15 %
Other species stumpage to western hemlock log price	16.15 %

9. THE PORTLAND AREA DIRECTOR of the Bureau of Indian Affairs or his duly authorized representative, hereinafter called the Area Director, shall obtain from the Pacific Northwest Loggers Association, through its published reports or otherwise, the average sales prices of logs in the Grays Harbor, Puget Sound, and Columbia River log markets for each quarterly period during the life of this contract or any extension thereof, and shall calculate the average log prices of each species on the same basis of log grade percentages as those used in determining the weighted average log prices stipulated in Section 7. In determining the stumpage rates for saw logs to be effective for any given quarterly period, the percentages stipulated in Section 8, or the percentages which may be subsequently established under the provisions of Section 10, shall be applied to the calculated Grays Harbor-Puget Sound-Columbia River average log prices for the preceding quarterly period, and the saw timber stumpage rates for each species so determined shall be the rates to be paid for timber actually scaled during such given quarterly period.

10. THE OFFICER APPROVING THIS CONTRACT or his duly authorized representative, hereinafter called the Approving Officer, may review, the stumpage rates established by the procedure set forth in Sections 6 to 9 inclusive, either on his own initiative or upon submission by the Purchaser of evidence satisfactory to the Approving Officer that such a review should be made. If, as a result of said review, the Approving Officer finds that the character of the operation, changes in market conditions, or other factors have altered the situation to such an extent that, in his opinion, a change in the existing ratios between stumpage rates and the Grays Harbor-Puget Sound-Columbia River weighted average log prices is warranted, he shall give thirty days notice to the Purchaser and the Indians in General Council or their authorized representatives of his intention to establish new ratios between stumpage rates and the Grays Harbor-Puget Sound-Columbia River weighted average log prices, during which time the Purchaser and the Indians may consult with the Approving Officer; PROVIDED, That the requirements of notice of this section shall be satisfied when the new ratios established under this authority are made effective upon the first day of a quarterly adjustment period which is not less than thirty days following notice by the Approving officer to the Purchaser and the Indians that he intends to proceed under the authority of this section to change such ratios; PROVIDED FURTHER, that there shall be no change in the ratio of any species until two years subsequent to the date of approval of this contract; and PROVIDED FURTHER, that the said ratio for any species shall not be changed oftener than once in any calendar year. The stumpage rate for cedar poles may be adjusted by the Approving Officer, at any time in accordance with the trend of the cedar pole market in the general locality of Grays Harbor. Notice of the new cedar pole stumpage rate will be furnished the Purchaser and the Indians at least thirty days prior to the date on which it will become effective.

11. NOTWITHSTANDING any other provisions of this contract it is mutually agreed that, in the event the said Pacific Northwest Loggers Association's Composite Sales Analyses are unavailable during any periods of this contract for use in connection with these stumpage adjustments, or in the opinion of the Approving Officer they do not properly reflect the true market value of the stumpage, the Approving Officer shall at any time, after giving thirty days notice to the Purchaser and to the Indians in General Council or their authorized representatives, during which time they may consult with the Approving Officer, proceed to revise stumpage rates in this contract as the trend of economic conditions in the West Coast forest products industries shall warrant; PROVIDED, that the requirements of notice in this section shall be satisfied when the new rates established under this authority are made effective thirty days after notice by the Approving Officer to the Purchaser and the Indians that he intends to proceed under the authority of this section to revise stumpage rates; PROVIDED FURTHER, that the requirements of quarter-annual adjustment of stumpage rates shall not apply to the procedure authorized by this section.

12. IT IS FURTHER UNDERSTOOD AND AGREED that stumpage rates will never, in any event, be reduced below the following:

$3.50 per M feet, BM for western red cedar
$4.00 per M feet, BM for Sitka spruce
$4.25 per M feet, BM for Douglas fir
$1.00 per M feet, BM for Amabilis fir
$3.50 per M feet, BM for Western white pine
$1.00 per M feet, BM for Western hemlock and other species
$0.02 per lineal foot for cedar poles

13. THE PURCHASER FURTHER AGREES that prior to the time when the stumpage value of the timber cut from both allotted and unallotted lands shall exceed the cash deposit of $190,000.00 submitted with his proposal to purchase timber, he will make another cash deposit of $25,000.00 and subsequent deposits of $25,000.00 at such times as may be necessary to insure that the stumpage value of the timber cut and not paid for at any time shall not exceed the cash deposit then in the hands of the Special Disbursing Agent, PROVIDED, that in the discretion of the Area Director, the last cash deposit in any logging season may be in the sum of not less than $10,000.00.

14. THE PURCHASER FURTHER AGREES that within thirty days from the date of approval of the contract on each allotment he will pay twenty-five per cent of the estimated value of the timber thereon as an advance payment, and further, that within three years from the approval of such contract he will pay an additional fifteen per cent of the estimated value of the timber as an advance payment, and an additional ten per cent as an advance payment within six years of approval of the allotment contract; PROVIDED, that with respect to each allotment contract, no advance payment will be required in an amount that will make the sum of that payment, plus all previous advance payments, plus all advance deposits previously applied against timber cut from the allotment, exceed fifty per cent of the estimated value of the timber; PROVIDED FURTHER, that the estimated value of the timber shall be determined by multiplying the volumes of each species estimated to be cut by the following corresponding rates:

Western red cedar	$13.30 per M ft. BM
Sitka spruce	$10.80 " " " "
Douglas fir	$15.00 " " " "
Amabilis fir	$ 6.65 " " " "
Western white pine	$ 8.80 " " " "
Western hemlock and other species	$ 6.40 " " " "
Western red cedar poles	$ 0.055 per lineal foot

PROVIDED FURTHER, that the stumpage rates governing at the time the timber is scaled shall be the rates charged for the timber actually cut. IT IS MUTUALLY UNDERSTOOD AND AGREED, that the Area Director, on his own initiative or upon submission by the Purchaser of evidence satisfactory to the Area Director, in his discretion may revise the estimated volume of timber on any allotment because of errors in estimate, or because of fire or other losses not due to any act or neglect of the Purchaser, but not because of depletion through cutting under authority of the allotment contract, PROVIDED, that in case the advance payments made on any allotment contract exceed the total value of timber cut and removed from the allotment by the Purchaser, it is mutually agreed that such advance payments are declared to be the value of such timber so cut and removed.

15. THE PURCHASER FURTHER AGREES that he will, unless relieved by the Commissioner of Indian Affairs, cut and pay for from some portion of the sale area, including allotments, at least 20,000,000 feet, board measure, Scribner Decimal C Log Scale, prior to April 1, 1954 and not less than 20,000,000 feet board measure in any twelve months ending March 31 thereafter during the life of this contract. PROVIDED, that all timber on this unit must be cut and paid for prior to the contract expiration date; that he will pay for, as merchantable timber, pieces twelve feet and longer, will utilize the trees to a diameter of ten inches in the tops where

straight and sound, and will pay for all timber, except cedar poles, on the basis of a scale recognizing 40 feet as the maximum length of a single log; and that all logs will be considered merchantable as provided in the attached General Timber Sale Regulations or as otherwise provided in Section 21 of this contract.

16. THE CUT in any contract logging year ending March 31, not including cutting deficiencies from any previous year or years, shall not exceed 35,000,000 feet board measure, Scribner Decimal C Log Scale, without the written consent of the Area Director. Logging performance in any contract logging year beyond the minimum required therefor shall not be applied against the cutting requirements of subsequent years without the written consent of the Area Director.

17. IT IS UNDERSTOOD AND AGREED, that the volume of timber cut under this contract in any contract logging year ending March 31 shall not be credited against the minimum cutting requirements of that year until the Purchaser has cut and made available for scaling in the usual manner a volume of timber equal to that of the existing unexcused deficiencies in cutting requirements of the preceding year or years; PROVIDED, that all timber cut during the quarter-annual period or periods in which there remains an unexcused deficiency in cutting requirements of a previous year, shall be paid for at the stumpage rates in effect at the time of scaling said timber or at the rates that were in effect on March 31 of the year in which the deficiency in cutting occurred, whichever are the higher. PROVIDED FURTHER, that the Commissioner of Indian Affairs may relieve the Purchaser in whole or in part from the minimum cutting and paying requirements because of adverse operating or market conditions, fire damage to the Purchaser's manufacturing plant, acts of God or Government control, or for other cause deemed sufficient by him.

18. THE PURCHASER FURTHER AGREES that if fire, for the starting or spread of which he, or any of his employees, his sub-contractors, or their employees, are responsible by act or neglect, shall destroy young growth under ten inches in diameter on any portion of the reservation, he will pay liquidated damages of twenty dollars ($20.00) per acre for the area thus burned over unless a lesser rate of damages shall be approved by the Approving Officer; and he agrees that in addition to these liquidated damages, he will pay the damage that shall be caused to all timber ten inches and larger in diameter at four and one-half feet from the ground or to any other property of the Indians or the Government. Should merchantable timber be injured by a fire for the origin or spread of which the Purchaser, his agents, employees, sub-contractors or their employees, are in no way responsible, said Purchaser shall be accountable for the loss sustained only to the extent that such loss shall be due to his failure to cut and remove the injured timber as expeditiously as shall be possible under the existing circumstances and the terms of this contract.

19. IT IS UNDERSTOOD AND AGREED, that in addition to the provisions of Section 5 of the attached General Timber Sale Regulations, this contract is subject to any existing rights of way.

20. THE PURCHASER AGREES that he will re-establish individual allotment boundaries and corners, and will keep them clearly marked while logging is in progress. The re-established boundaries and corners shall be verified by the Officer in Charge before logging on an allotment is begun. THE PURCHASER ALSO AGREES to brand all logs and other forest products on each allotment, as prescribed by the Officer in Charge, in order to permit ready identification at the point of scaling, and for

this purpose he shall register with the State of Washington a sufficient number of brands to provide a separate brand for each allotment on which operations may be in progress at any one time, such brands to be designated for exclusive use on logs and other forest products cut under this contract.

21. IN LIEU OF THE SCALING PROCEDURE stipulated in the General Timber Sale Regulations, it is mutually agreed that the Commissioner of Indian Affairs, hereinafter called the Commissioner, in his discretion and for such periods as he may elect, may require that logs cut under this contract shall be scaled by a log scaling organization, hereinafter referred to as the scaling bureau, to be designated by the Commissioner. The designated scaling bureau shall be one that is recognized as competent by the lumber industry. Scaling by a log scaling bureau shall not be exclusive so as to prevent scaling, in the manner stipulated in the General Timber Sale Regulations, of material that is not delivered to the point of bureau scaling. Should the Commissioner intend to change from one scaling procedure to the other he shall notify the Purchaser in writing not less than thirty days prior to the effective date of such change. The following general conditions shall apply to bureau scaling:

Upon notification by the Commissioner that the services of a log scaling bureau are required, the Purchaser shall enter into an appropriate agreement with the designated scaling bureau for the performance of all necessary scaling and reporting services, and shall promptly submit to the Commissioner certified copies of such agreement in triplicate.

The agreement shall provide for the prompt scaling of all material upon delivery to the place of scaling. It shall also provide for prompt submission to the Superintendent of certified copies of each and every scale report, showing the species, volume, grade, and brand of each log scaled; with such safeguards being included in the agreement as the Commissioner may deem necessary to insure an accurate accounting to the Superintendent of all logs that are presented to the scaling bureau for scaling.

The scaling bureau's rules respecting scaling, grading, and merchantability shall apply.

The Purchaser shall pay the scaling bureau for all services rendered by it under the agreement.

No logs shall be moved from the place of scaling until they have been scaled. Customary methods employed by the scaling bureau for indicating completion of the scaling shall be accepted in lieu of the numbering and stamping of logs stipulated in Section 22 of the General Timber Sale Regulations.

22. IT IS MUTUALLY AGREED that the Purchaser shall have all reasonable latitude in his logging operations consistent with the requirements of selective logging and the other requirements of this agreement. In order to assist in meeting these requirements, and in addition to Section 9 of the General Timber Sale Regulations, the Purchaser agrees to submit a plan of his logging operations for each contract logging year beginning April 1, said plan to be of a form satisfactory to the Area Director. The Purchaser further agrees that he will undertake no logging

operations in any contract logging year until the Area Director shall have approved, in writing, the plan of operations for such logging year; PROVIDED, that there shall be no departure from the approved plan of operations without the consent, in writing, of the Area Director.

23. THE PURCHASER FURTHER AGREES THAT on all roads constructed or improved by him in connection with the logging of timber under this contract, and all bridges, trestles, drainage structures and like improvements will be left intact at the completion of logging operations and will become the property of the United States for the use and benefit of the Quinaielt Indians when the contract is completed. The Purchaser further agrees that, in the event he shall use existing Indian Service roads in connection with the logging of the timber under this contract, he will properly maintain such roads.

24. THE PURCHASER shall furnish and maintain in good and serviceable condition such fire fighting tools and equipment, and provide such fire protection personnel as may be required by the Area Director to meet the fire protection requirements of the contract, the General Timber Sale Regulations, and the existing fire danger hazards or risks. The requirements shall not be less than are required under laws of the State of Washington.

25. THE PURCHASER FURTHER AGREES that within one year from completion of logging on any spur or main logging road he will cause all snags more than fourteen inches in diameter at four and one-half feet from the ground and more than sixteen feet in height from the ground to be felled unless relieved by the Area Director. The Area Director may relieve the Purchaser in whole or in part of the requirements of Sections 25 and 26 of the General Timber Sale Regulations. Waivers of snag felling requirements or the requirements of Sections 25 and 26 of the General Timber Sale Regulations shall always be specific with respect to areas involved, and will not be considered valid unless made in writing.

26. IT IS UNDERSTOOD AND AGREED, that after the close of each calendar year, and in any event not later than the date specified by the Area Director, the purchaser will submit to the Commissioner of Indian Affairs, through the Area Director, a financial statement of operations and sales in triplicate for the calendar year just ended. Such statements shall be of a form satisfactory to the Commissioner of Indian Affairs, and shall be certified by a certified public accountant and the Purchaser.

27. IT IS FURTHER UNDERSTOOD AND AGREED that this contract shall be null and void and of no effect until approved by the Secretary of the Interior and until the latter shall approve a bond in the penal sum of $100,000.00 conditioned on the faithful performance of all the terms of this contract and the General Timber Sale Regulations attached hereunto;

Signed and sealed in sextuplet this 10th day of June, 19 52.

(Purchaser)

By _____
(Title) C. B. [illegible], President

ATTEST:

_____
(Secretary) Robert L. [illegible]

Witnesses:

_____

_____

_____
(Superintendent)
Raymond L. Bitney, Superintendent,
Western Washington Agency

Signed this 10th day of June, 19 52, for the Quinaielt Tribal Council pursuant to the action of the council in a meeting held at the Taholah, Washington, on the 14th day of June, 19 52.

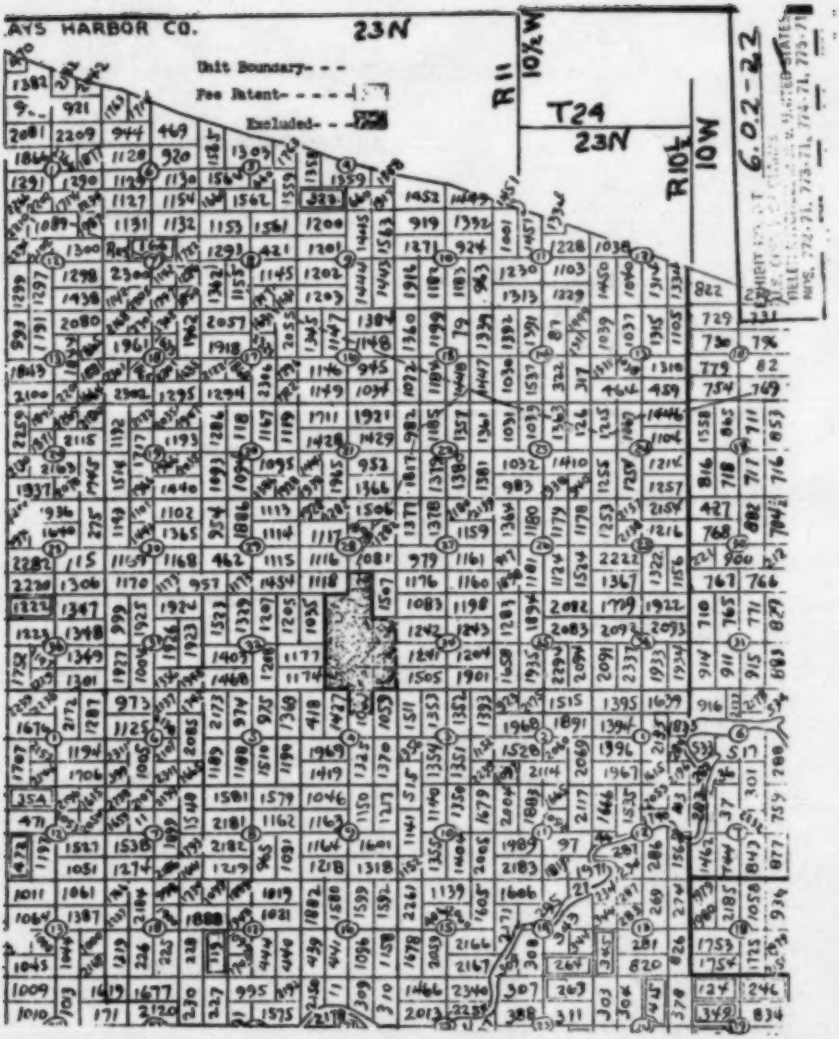
_____
(Title) Cleveland Jackson, Chairman

ATTEST:

_____
(Secretary) Theodore [illegible]

Approved JUL 31 1952, 19__

_____
Under Secretary of the Interior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S-699
Approved by the Assistant Secretary of the Interior, April 10, 1939

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF INDIAN AFFAIRS

GENERAL TIMBER SALE REGULATIONS

1. The word **superintendent** as used in these regulations signifies the Superintendent of the Indian Agency or School within the jurisdiction of which the land covered by any contract is included.

2. The term **officer in charge**, wherever used in these regulations, signifies the forest officer of highest rank assigned to the supervision of timberwork on the reservation within which the sale area is situated or such other officer as may be designated by the Commissioner of Indian Affairs to supervise a sale.

3. **Log scalers** will be appointed by the Commissioner of Indian Affairs and receive their instructions from the officer in charge.

4. **No timber** other than that sold may be cut by the purchaser on the sale area without a separate contract of sale therefor, and timber on allotments within a general sale area held under trust or restricted patents cannot be logged without a contract with the owners of the allotment approved by the proper officer.

5. **Other sales** within a sale area may be made of products and kinds of timber not sold under a previous sale, provided such sales will not, in the judgment of the officer having authority to make such sale, interfere with the operations of the previous purchaser. **Rights-of-way** may be granted through portions of the sale area during the contract period, provided they do not interfere with the operations of the previous purchaser.

6. **Title** to the forest products covered by any contract will not pass to the purchaser until such products are paid for.

7. **Cash deposits in advance** of cutting will be required. If at any time the stumpage value of the timber cut and unpaid for shall exceed the total amount then on deposit with the Indian Service, an additional deposit shall be required. At the close of each month a statement of all timber cut during the month will be rendered to the purchaser as a demand for payment of the full stumpage value of the timber covered by such statement. As soon as payment is made of the amount covered by such statement, the full amount previously deposited will become available as an advance deposit on timber cut subsequent to the period covered by such statement. At any time that the stumpage value of the timber cut shall exceed the amount of advance deposit cutting operations shall be suspended.

8. **The general advance deposits** required by a contract which includes both allotted and unallotted land will be credited so far as necessary on allotments cut during the period covered. The fact that **special advance payments** have been made on allotments which are about to be cut will not operate to reduce the size of the required **general advance deposit**, but rather will postpone the necessity of making demand for it until the advance payments on the particular allotments being cut have also been exhausted. The deposit made with the bid for the timber will be applied as a general advance deposit.

9. **The areas** to be logged in any season may be designated by the officer in charge when in his judgment this is necessary to prevent deterioration from fire, worms, or other cause or

EXHIBIT NO. DT 6.02-2.3
U.S. COURT OF CLAIMS
HELEN [illegible] et al. v. UNITED STATES
NO. [illegible]-71, 774-71, 775-71

to insure the logging of the sale unit in such manner as to fully protect the interests of the United States and the Indians. When logging is begun on an allotment or natural logging unit, it will not be discontinued and started elsewhere without the written consent of the officer in charge.

10. **Selective logging**, or the logging of areas in such manner as to preserve a part of the merchantable timber, promote the growth of young trees, or preserve the forest cover, will be practiced on all lands chiefly suitable for the production of timber crops. Live trees of diameters below those named in the contract may be designated for cutting, and larger trees may be reserved from cutting in the discretion of the officer in charge. If live trees which are not designated for cutting are cut, or are seriously injured through lack of care, they will be double scaled and so charged and paid for. In the discretion of the officer in charge, a strip not exceeding 300 feet in width on each side of streams, roads, and trails, and in the vicinity of camping places and recreation grounds may be reserved, in which little or no cutting will be allowed.

11. **All dead trees** standing or fallen which contain one merchantable log or more will be logged for their merchantable contents, and wherever selective logging is required by the contract the purchaser will fell all other dry trees before the slash is burned.

12. **Firewood and improvements** will be made as far as possible from unmerchantable material, and material so used will not be charged to the purchaser. The use of such material from allotments may be restricted in the discretion of the officer in charge. Wood and improvements taken from merchantable material will be scaled or measured, charged, and paid for at its maximum value.

13. **Young growth** will be protected as far as possible in every branch of the logging operations, and its use in the construction of improvements may be restricted by the officer in charge.

14. **Stumps** will be cut low so as to avoid waste, and the mean height of any stump will not exceed one-half its diameter, except where because of defect or deformity this height is considered impracticable by the officer in charge, provided that the minimum height required will be 12 inches.

15. **Waste** in high stumps, butts, tops, breaks, skids, and partially sound logs and all trees designated for logging which are not logged and all trees which are left felled or lodged or badly damaged by the logging operations will be scaled for their merchantable contents and charged against the purchaser. All cutting shall be done with a saw when possible.

16. **Carelessness** on the part of fellers or other employees of the purchaser that results in unnecessary breaking of trees will be penalized by scaling such trees full as if they had not been broken.

17. **The log lengths and products** taken from each tree will be such as to completely utilize the merchantable material in the tree and to yield the maximum stumpage value. Trees improperly cut into lengths or products of a lesser value shall be scaled, counted, or measured as if cut so as to yield the maximum value.

18. **The Scribner Decimal C** log rule will be used in scaling logs. The rule will be read to the nearest inch on the average top diameter inside bark. Logs exceeding the maximum length allowed by a contract will be scaled as two or more logs, with proper allowance for the increase in diameter at the points of division.

19. **The overlength** allowed on logs for trimming will not exceed 1 inch to each 4 feet of length. Logs which overrun this allowance will be scaled as if cut 2 feet longer. Logs longer than the maximum scaling length named in the contract will be scaled as if bucked into two or more shorter logs and with the top diameters they would actually have if so cut.

20. **Proper deductions** will be made for rot, shake, hollow, and other defects which make a log partially unmerchantable, including sweep exceeding 1 inch in each 4 feet of log length, but deductions will not be made for any defect or damage due to the act or neglect of the purchaser or his employees.

21. **A check scaler** employed by the purchaser may at hours convenient to the scaler and with the consent of the officer in charge compare his scale of logs with that of the scaler. A copy of the regular scale reports will be furnished to the purchaser through the officer in charge.

22. **For convenience in scaling** the logs or other products will be bunched as the scaler may direct on the land where cut or at the landing or point of shipment and will not be moved therefrom until he has scaled, numbered, and stamped them. Logs that are moved contrary to the scaler's instructions will be double scaled. Where a separate record of the scale of timber from an allotment or other area is necessary, the logs cut from such area will be marked by the purchaser with a distinctive brand as prescribed by the officer in charge.

23. **A merchantable log** is any log that will manufacture one-third or more of its total contents into sound lumber 8 feet and longer, except as special provision is made in a particular contract. More defective logs and logs smaller than the merchantable size set in the contract will be culled if left in the woods, but any such logs that are taken for manufacture or sale will be scaled for their actual sound contents of lumber of any length. Any logs taken by the purchaser which are smaller than the minimum scaling length or diameter given on the log-scale rule will be scaled for their merchantable contents.

24. **Railroad ties** taken by the purchaser under a contract in which tie prices and specifications are not fixed will be scaled or counted as follows:

> Eight-foot ties made from logs 9 to 12 inches top diameter will be counted as 30 to the thousand feet board measure and 6½-foot ties as 38 to the thousand. Ties made from logs over 12 inches top diameter and long ties will be scaled. Ties made from logs less than 9 inches top diameter will be counted 60 ties 8 feet long and 75 ties 6½ feet long to the thousand feet.

25. **The slash** resulting from the logging operations, including all branches up to 4 inches in thickness lopped from tops and logs, will at the time of skidding be piled compactly and away from reserved trees on the whole area to be selectively logged and on a strip at least 10 rods wide around all other logging areas in units not larger than quarter sections, unless some other method of slash proposal is provided in the contract.

26. **Burning** of the slash by the purchaser will be done at such times and in such manner as may be required by the officer in charge, who may at that time assume direct charge of the crew of the purchaser engaged at the work of burning. Slashing will not be burned during any period of fire danger. Whenever fire runs through a slashing, except in compliance with the instructions of the officer in charge, the purchaser may be required to lop or to pile and reburn the slash.

27. **Unsatisfactory disposal** of the slash will be cause for the officer in charge to suspend all operations of the purchaser until the unsatisfactory condition is corrected.

28. **Forest fires** on the sale area or adjacent lands during the contract period will be prevented or suppressed by the purchaser, his employees, and subcontractors whenever possible. When called upon by an authorized forest officer, they will work under his directions to suppress fires. If the purchaser or his employees or subcontractors were not directly or indirectly responsible by act or neglect for the origin or the spread of the fire, reimbursement will be made, except that such reimbursement shall not exceed one-half the cost of suppression within the sale area or within one-half mile of the same.

29. **Donkey logging** may be permitted in the discretion of the Commissioner of Indian Affairs. The ground around the donkey engine will at each setting be cleared of dry trees for a distance of 10 rods and of all other combustible material for a distance of 50 feet in all directions during the season from May 1 to September 30 and any other season of fire danger.

30. **All steam engines** not burning oil for fuel during the period from May 1 to October 15 and all other seasons of fire danger will be equipped with spark arresters acceptable to the officer in charge, and, excepting locomotives, will have a steam force pump with not less than 1-inch discharge, 100 feet of serviceable 1-inch hose, 6 12-quart pails, 6 shovels, and a constant supply of not less than the equivalent of 12 barrels of water. This equipment will be suitable for fire-fighting purposes and kept in serviceable condition and used when necessary for fighting fires.

31. **A watchman** employed by the purchaser and kept on duty during the noon hour at each engine in actual use and not burning oil, and during the night if fires are kept up, may be required by the officer in charge during the period from May 1 to October 15 and any other period of fire danger.

32. **Rigging** will not be slung on trees reserved from cutting without the use of bushing, and only in a manner satisfactory to the officer in charge.

33. **Clearing the right-of-way** of the logging railroad and its spurs and the careful burning of all combustible material for a distance of 50 feet on each side of the track is required of the purchaser unless the officer in charge shall, in writing, prescribe a lesser width. And the purchaser shall for such periods as may be required by the said forest officer in charge patrol all railroad tracks after the passage of each locomotive.

34. **The vicinity of logging camps** and stables will be kept in a clean and sanitary condition, and rubbish will be removed and properly burned or buried during the occupancy and upon the removal of the camps and stables.

35. **Streams** will not be obstructed by felled trees or otherwise except by the improvements hereinbefore provided for, nor will they be polluted by sawdust, manure, or any other refuse from a camp or mill.

36. **Damage to land or other property** of the Indians or the Government resulting from rights-of-way, dams, and other improvements or operations of the purchaser will be appraised by the officer in charge, and if not offset by the value of the permanent improvements made by the purchaser will be charged against the purchaser.

37. **Existing telephone lines, fences, roads, trails,** and other improvements will be protected as far as possible in the logging operations, and whenever they are broken or obstructed the purchaser will promptly repair the damage. If he fails to make the repairs promptly, the officer in charge may make the repairs and purchaser may be charged with double the expense thereof.

38. **Telephone lines** constructed by the purchaser within the Indian reservation will be open to the free use of all Indian Service officers for official business, and the purchaser may for their construction and repair cut and use free of charge all necessary poles which are not otherwise merchantable and subject to regulation by the officer in charge.

39. **Improvements necessary to execute his contracts,** such as camps, sawmills, railroads, roads, telephone lines, chutes, bridges, sluices, and dams, may be constructed and maintained by the purchaser on and across the contracted area and other tribal lands, subject to regulation by the Commissioner of Indian Affairs.

40. **Free transportation** of Indian Service employees engaged in official business will be allowed over all such railroads, and such employees may, at their own risk, operate hand cars or speeders over the track in such manner as not to interfere with the use of the railroad by the purchaser.

41. **Improvements already on the area** or on other lands of the reservation and which are necessary for logging purposes may be used by the purchaser subject to regulation by the Commissioner of Indian Affairs.

42. **The time limit** for the removal of the improvements and other property of the purchaser is 1 year after the expiration of the contract. After that time the title to improvements, including camps, will attach to the land, and no personal property of the purchaser will thereafter be removed except with the written consent of the officer in charge: *Provided*, That improvements necessary for the logging of other Indian timber may be left for such time and on such terms as may be prescribed by the Commissioner of Indian Affairs.

43. **Extension of time** for the performance of any contract may be granted the purchaser by the officer approving the contract, in his discretion and subject to such conditions as he may impose.

44. **If extension of time** to cut and remove the timber is not granted by the officer approving a contract, the purchaser can cut no timber after the expiration of the contract, but he may remove the timber, previously cut and paid for, within 1 year of the expiration of the contract. If not removed within the time allowed, the title will revert to the vendor notwithstanding the purchaser may have paid for the timber.

45. **Assignment** of any contract in whole or in part by the purchaser will not relieve him of his contract obligations unless the assignment is approved by the officer approving the contract nor until the bond is satisfactorily renewed.

46. **Refunds of overpayments** will be made to the purchaser by the approving officer provided all terms of the contract have been fulfilled, and the approving officer may also, in his discretion, **reduce the amount of timber** that is required by the contract to be paid for and removed in any one year.

47. **Indian labor** will be employed by the purchaser at the same wages as other labor and in preference to other labor not already in his employ whenever the Indian labor seeks employment and is competent.

48. **All regulations** relative to the maintenance of order on Indian reservations and the introduction of **intoxicating liquors** will be complied with by the purchaser.

49. **In compliance with law and Executive order,** no Member of Congress or any Delegate thereto shall have any interest, direct or indirect, in the contract of which these regulations are a part (sec. 3741, R. S., and secs. 114–116, act of Mar. 4, 1909, 33 Stat. L., 1109), and no person undergoing a sentence of imprisonment at hard labor shall be employed in carrying out any contract (Executive order, May 18, 1905). The cutting or removal of timber from Indian lands in breach of the terms of any contract and without other lawful authority, or the leaving of fires unextinguished, will render the offenders liable to the penalties prescribed by section 6 of the act of June 25, 1910 (36 Stat. L., 857). Section corners, quarter section corners, or meander posts on any Government line of survey shall not be destroyed, defaced, changed, or removed to any other place, nor shall any witness trees or any tree blazed to mark the line of a Government survey be cut down in the carrying out the provisions of this agreement. (See sec. 57, act of Mar. 4, 1909, 35 Stat. L., 1099.)

50. **The expenses** of examining, advertising, marking, scaling, and protecting the timber and of general supervision of the sale will be paid out of a timber expense fund, for which purpose not over 10 percent of the gross proceeds of the sale will be set aside.

51. **All the records** of the purchaser and his subcontractors pertaining to the logging operation and the manufacture and sale of the products thereof will be open to inspection at any reasonable time by the officer in charge or other officer designated by the Commissioner of Indian Affairs, and the information so obtained will be regarded as confidential. The purchaser will

furnish the officer in charge, at such times as he may request, the amount of lumber sold and the average grade prices received f. o. b. the mill during certain periods; also the amount of box lumber sold, with average price per M; the amount of ties and timber sold, with average price per M; and the amount of byproducts sold and the total receipts for same.

52. **Suspension of the purchaser's operations** may be made by the officer in charge if any requirements of the contract and of these regulations are disregarded and until there is satisfactory compliance. Persistent failure to comply with any one of the requirements of the contract or regulations after written notice addressed to the purchaser by the superintendent or the officer in charge will be ground for revocation by the officer approving the contract of all rights of the purchaser under this and other contracts and the forfeiture of his bond and of all moneys paid, and the purchaser will be liable for all damage resulting from his breach of contract.

53. **Complaints** by the purchaser arising from any action taken by the forest officer in charge under the terms of any contract will not be considered unless made in writing to the Commissioner of Indian Affairs within 30 days of the alleged unsatisfactory action.

54. **The decision** of the officer approving any contract will be final in the interpretation of the contract and of the regulations, and the terms of the contract or regulations cannot be varied in any detail without the written approval of the officer approving the sale.

55. **Whenever any bond** furnished to guarantee obligations under a sale shall be unsatisfactory to the officer approving the sale he may require a new bond which shall be satisfactory to him.

56. **Failure of the purchaser** to complete his contract or to log promptly an area damaged by fire, wind, insects, or other causes, or the commission by him of any act for which the officer approving his contract shall declare the contract forfeited, will render the purchaser and his bondsmen liable for the depreciation in the value of the remaining timber on an estimate of value and quantity to be made under the direction of the officer approving this contract.

The above General Timber Sale Regulations are hereby prescribed for use in all contracts for the sale of timber from Indian lands except as special provision shall be made by the Commissioner of Indian Affairs or the Secretary of the Interior in particular sales.

U. S. GOVERNMENT PRINTING OFFICE : 1948 O - 749888

Petitioner's Reply Brief

Office-Supreme Court, U.S.
FILED
FEB 22 1983
ALEXANDER L. STEVAS,
CLERK

No. 81-1748

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

HELEN MITCHELL, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

In our opening brief we explained that the decision below subjects the United States to liabilities not contemplated or authorized by Congress because none of the statutes that the Court of Claims held to render the United States answerable in damages " 'can fairly be interpreted as mandating compensation by the Federal Government for the damage [allegedly] sustained' " *United States* v. *Testan*, 424 U.S. 392, 402 (1976), quoting *Eastport Steamship Corp.* v. *United States*, 372 F.2d 1002, 1008-1009 (Ct. Cl. 1967). Respondents and the amici — like the court below — have not endeavored to demonstrate that Congress actually intended to render the United States answerable in damages upon claims of the kind presented here. They thus disregard this Court's admonition — which applies with special force where, as here, it must be applied against the backdrop of sovereign immunity — that the "ultimate question is one of congressional intent, not one of whether this Court thinks

that it can improve upon the statutory scheme that Congress enacted into law" (*Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 578 (1979)). See also *United States* v. *Testan*, *supra*, 424 U.S. at 400. The arguments of respondents and the amici accordingly fail to establish the necessary predicate for relief. Several subsidiary matters, however, warrant brief reply.

1. Respondents (Br. 13-14 & n.16) and the amici (Br. 20-24) suggest that our argument would impose a requirement that sovereign immunity be waived twice as to any claim to be maintained against the United States. This is a distortion of our argument. Whether the Tucker Act should be said to be purely jurisdictional and devoid of any waiver of sovereign immunity as to statutory claims, as the Court said in *Testan*, *supra*, 424 U.S. at 398, 400, or whether as we suggest (and respondents agree) it is better to describe the Tucker Act as effecting a conditional waiver of immunity as to a particular type of statutory claim, is, as we explain in our opening brief (pages 18-19 n.12), merely a semantic nicety. In either event it remains necessary that any statute relied upon to authorize the recovery of damages *itself* "mandat[e] compensation by the Federal Government for the damage [allegedly] sustained." *Testan*, *supra*, 424 U.S. at 402. This is not to require a double waiver of immunity; it is merely to insist that Congress must have authorized the recovery of damages against the United States upon the particular type of statutory claim asserted against it.[1] And

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[1]Contrary to the submission of the amici (Br. 4, 21-22), *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725 (1950), lends no support to the decision of the Court of Claims. No sovereign immunity issue was addressed in that case. In any event, the holding was that the federal reclamation project effected a taking of water rights recognized under state law to which Congress had expressly deferred by statute, and that Congress intended to acquire those rights rather than rely upon its power under the navigation servitude. See 339 U.S. at 739. Because a

only Congress can authorize such recovery. *United States* v. *Shaw*, 309 U.S. 495, 500, 502 (1940).

2. Respondents (Br. 19, 29-33) and the amici (Br. 5-13), argue that the various statutes in issue which impose duties upon, or grant authority to, the Secretary of the Interior, "engraft specific duties into the United States' trusteeship under the [General] Allotment Act" (Resp. Br. 19), and that they therefore overcome the holding of this Court in *United States* v. *Mitchell*, 445 U.S. 535, 542 (1980) ("*Mitchell I*") that the General Allotment Act "created only a limited trust relationship between the United States and the allottee that does not impose any duty upon the Government to manage timber resources." This contention is doubly flawed. First, as explained below, there is no evidence that the *statutory* duties Congress imposed by enacting the various provisions at issue were intended to impose trust duties. In any event, as explained in our opening brief (pages 41-48), the mere existence of a trust of some kind does not necessarily establish that Congress has consented to recovery of damages; the issue remains one of congressional intent.

None of the timber sale or management statutes upon which respondents rely make any reference whatsoever to trust duties. Moreover, none makes any reference to the General Allotment Act trust. Indeed, as the amici observe (Br. 7-8), the 1910 Act authorizing sale of Indian timber applies to allotted and unallotted lands. And when enacted,

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taking was recognized, no sovereign immunity objection could have been raised. See *Jacobs* v. *United States*, 290 U.S. 13 (1933).

Reliance of the amici (Br. 22-23) upon *Seminole Nation* v. *United States*, 316 U.S. 286 (1942), is misplaced for the reasons noted in our opening brief (page 47 n.38). The special jurisdictional Act (see Amicus Br. 23) in that case was, on its face, authority to recover damages against the United States for a treaty violation of the kind involved, and is not in any respect comparable to the jurisdictional grant of the Tucker Act.

25 U.S.C. 406 applied without distinction to timber on "any Indian allotment held under a trust or other patent containing restrictions on alienations." 36 Stat. 857. The present formulation is even broader and applies to "any Indian land held under a trust or other patent containing restrictions on alienations." 25 U.S.C. 406(a). Section 466 of Title 25, upon which respondents also rely applies simply to "Indian forestry units." The legislative histories of the various statutes, moreover, contain no hint that Congress considered itself to be adjusting the terms of the General Allotment Act trust.[2] Moreover, it would be peculiar indeed for Congress to have acted in that manner, thereby creating monetary liabilities as to allotments made under the General Allotment Act, but eschewing such liabilities when the allotment or other Indian land was merely held under a restriction upon alienation not employing trust language. See *Mitchell I, supra,* 445 U.S. at 543-544. In any event, nothing in the language or legislative history of the various statutes at issue reflects any congressional awareness much less any intention that, read in conjunction with the General Allotment Act, they render the United States answerable in damages. Respondent's claims must stand or fall on the statutes cited themselves.

3. Significantly, neither respondents nor the amici even attempt to canvass the language or legislative history of several of the statutes held by the Court of Claims to create a predicate for an award of damages. Thus respondents

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[2]There is no basis for respondent's suggestion (Br. 19 n.22) that 25 U.S.C. 406, 407, and 466, were adopted as "amendments to the General Allotment Act." As the amici recognize (Br. 10-11), 25 U.S.C. 466 was enacted as Section 6 of the Indian Reorganization Act of 1934. Section 2 of that Act, 25 U.S.C. 462, alone may be regarded as amendatory to the General Allotment Act, for it extended indefinitely the duration of the restraint on alienation created by the General Allotment Act.

make no effort to support the Court of Claims' decision recognizing monetary liability under 25 U.S.C. 318a, and 25 U.S.C. 323-325 (Pet. App. 15a-16a), under the analysis required by *United States* v. *Testan, supra.* See Brief for the United States 36-38. Nor do respondents make any effort to adduce evidence that *Congress intended* by enacting 25 U.S.C. 162a, to render the United States liable for any amount by which the revenues earned by investment of Indian timber revenues held by the United States falls short of that obtainable by exercise of "reasonable management zeal to get for the Indians the best rate" (Pet. App. 20a).[3]

4. Respondents contend (Br. 18-28, especially at 25) that the only value to them of federal supervision of timber sales is monetary, and that the duties imposed upon the Secretary by the various timber sale statutes must accordingly be regarded as the equivalent of a statutory directive to pay money to respondents, for purposes of establishing the required consent to suit. The pertinent question, however, is not whether the ultimate value to respondents of the duties imposed is financial, but whether Congress imposed a duty to pay money upon the United States.[4] The terms of the congressional directives, must of course be considered controlling in determining whether Congress has consented to have the United States held answerable in damages.

As explained in our opening brief (pages 23-26), statutes, such as those in issue, that impose duties of action upon

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[3] *Moose* v. *United States*, 674 F.2d 1277 (9th Cir. 1982), upon which respondents rely (Br. 32) is distinguishable to the extent that the court of appeals relied (674 F.2d at 1280 & n.5) upon 25 U.S.C. 161a, which has no application here. See Brief for the United States 38-39.

[4] The point made by respondent could equally have been made by the respondent in Testan, with regard to the Classification Act. See 424 U.S. at 398-405. Plainly the teaching of Testan cannot be so easily circumvented. Cf. *Army & Air Force Exchange Service* v. *Sheehan*, No. 80-1437 (June 1, 1982), slip op. 10-13.

federal officers are sharply to be distinguished from those directing payment of money. In the former situation the effect upon the Treasury of failure to perform the statutory mandate is entirely different than the effect of performing the mandate, whereas in the latter situation the consequences are identical. Cf. United Staates Constitution, Article I, Section 9, Clause 7.[5] Thus in the former situation, absent some affirmative indication that Congress has consented to monetary liability in the event of a statutory violation, it must be presumed that Congress has not provided authority for recovery of damages.[6]

5. Respondents (Br. 27-28), and amici (Br. 16-20) seek support for their contentions in 28 U.S.C. 1505. To the extent that they do so, they necessarily quarrel with the holding of *Mitchell I, supra,* 445 U.S. at 538-540, that "28 U.S.C. § 1505 no more confers a substantive right against the United States to recover money damages than does 28 U.S.C. § 1491." All of the arguments now rehearsed based

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[5]To make the point another way, damages and injunctive relief are indistinguishable in effect in the latter situation.

[6]For the reasons stated in our opening brief (pages 19-22), contrary to respondent's contention (Br. 13-18) legislation creating a right to payment of money is not necessarily sufficient to create a right to recover damages. Respondent ignores the actual holding in *Testan,* 424 U.S. at 402, that the statute relied upon to create a right to recover, must, by itself, "fairly be interpret[able] as mandating *compensation* by the Federal Government for the *damage sustained*" (emphasis added). Because no statute cited by respondents even requires payment of the moneys said to be recoverable by the Court of Claims, respondents' reading of *Testan* is in any event unavailing.

Respondent's suggestion (Br. 25 n.32) that the statutes upon which they rely do mandate payment of money is disingenuous. As we explain in our opening brief (pages 30, 37), the Court of Claims' decision does not rest upon the government's obligations under those provisions of the pertinent statutes that do impose monetary duties. And the existence of explicit directions to pay certain sums is a telling indication that no larger duty to pay damages was imposed sub silentio.

upon legislative history were briefed and considered when this case was last here. See, *e.g.*, 445 U.S. at 539-540 & n.2.[7] Contrary to the assertion of the amici (Br. 20), to require, as the Court did in *Mitchell I*, that the statutes relied upon to establish that the United States is answerable in damages themselves reflect Congress' intention to accomplish that end would not "require a return to the special jurisdictional act system." That contention, too, was rejected in *Mitchell I*, 445 U.S. at 540 n.2. In any event, the logic of our position is simply that Indians, like other claimants against the United States, must be able to identify a legally sufficient statutory basis for their claims.

6. The remaining contentions raised by respondents are contrary even to the decision of the Court of Claims.

a. Respondents contend (Br. 34-37) that their claims may be entirely subsumed within the category of claims for "money improperly exacted or retained" as to which it may be unnecessary to identify a statutory basis for the recovery of damages. See *Testan, supra*, 424 U.S. at 401-402; see also *Eastport Steamship Corp.* v. *United States, supra*, 372 F.2d at 1007. This contention is at odds with the holding of the Court of Claims (Pet. App. 19a) recognizing only a narrow subset of respondent's claims — those for exaction of unlawfully excessive administration fees or other charges — to be sustainable on this basis.[8]

In any event, respondents' contention is plainly unsound. The authority upon which respondents rely, *Eastport Steamship Corp.* v. *United States, supra*, which was also the basis for the relevant discussion in *Testan, supra*, states

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[7]The dissenting Justices in *Mitchell I* did not quarrel with this branch of the Court's holding, and appear to have accepted it. See 445 U.S. 550-551 (White, J., dissenting).

[8]We have not challenged that aspect of the Court of Claims' decision. See Brief for the United States 37 n.31.

unequivocally that claims within this category (372 F.2d at 1007; emphasis added) "must assert that the value sued for was improperly paid, exacted, or taken from the claimant *in contravention of the Constitution, a statute or a regulation.*" Thus, as we noted in our opening brief (page 24 n.17), a statutory basis must be identified that establishes the wrongfulness of the exaction or nonpayment. It is therefore not enough that respondents articulate (Br. 35-36) a generalized extrastatutory trust responsibility respecting Indian property that is said to have been violated. Absent a demonstration (as yet unattempted by respondents) that federal management of their property effected a taking thereof, the allegation of a violation of a non-monetary duty is insufficient to render all of respondents' claims ones for money improperly exacted or retained.

b. Respondents also renew (Br. 29, 37-42) their contention, rejected by the Court of Claims (Pet. App. 22a), that their entire claim is cognizable, without regard to availability of a statutory predicate for recovery of damages, as one based upon an express or implied contract. See 28 U.S.C. 1491. The Court of Claims' conclusions that the powers of attorney relied upon by respondents (see Br. 38) "do not contain any express commitments against mismanagement in exercising the powers" (Pet. App. 22a), and that the timber sale contracts between the Indian allottees and timber companies do not support recovery of damages against the United States (*ibid.*), are plainly correct.[9]

Respondent's alternative contention (Br. 40-42) is that an implied contract against mismanagement came into being

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[9]To the extent that respondents' claim (Br. 29) that the Secretary acted under an express trust that was tantamount to an express contract, their contention is doubly flawed. As previously indicated (pages 3-4, *supra*), no express trust duties are at issue here. In any event, if a trust had been created, its genesis was, on respondents' own submission, statutory, not contractual.

between the United States and the respondents. But, as the Court of Claims indicated (Pet. App. 22a), respondents suggest nothing more than an implied-in-law "contract." The United States is not answerable in damages upon such quasi-contractual claims. *Hatzlachh Supply Co.* v. *United States,* 444 U.S. 460, 465 n.5 (1980). In any event, an implied-in-fact contract may not be inferred from the terms of the pertinent statutes and regulations. *Army & Air Force Exchange Service* v. *Sheehan, supra,* slip op. 10-13. Here as in *Sheehan* (slip op. 11-12) "[t]o accept this reasoning would be to undermine the Court's ruling in *Testan* that the Tucker Act provides a remedy only where damages claims against the United States have been authorized explicitly.[10]"

For the foregoing reasons and the reasons stated in our opening brief, the decision of the Court of Claims should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

FEBRUARY 1983

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[10]Of course, respondents' contention that an implied-in-fact contract exists would not, in any event, support the decision of the Court of Claims. That court has allowed respondents leave (to the extent permitted by the applicable rules) to amend their petitions to allege the formation of "actual agreements," cautioning (Pet. App. 22a) that such

> new allegations should at least be specific enough to call for a trial on the existence of the contracts, or to be capable of being backed up by documentary or affidavit support on a motion for summary judgment.

Respondents cannot avoid the obligation to *prove* the existence of the alleged implied-in-fact contracts by repeating in this Court the vague conclusory allegation found wanting below.

Amicus Brief

Office - Supreme Court, U.S.
FILED
NOV 8 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1748

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA,
Petitioner,

v.

HELEN MITCHELL, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Claims

BRIEF OF AMICI CURIAE SHOSHONE TRIBE OF THE WIND RIVER INDIAN RESERVATION; STANDING ROCK SIOUX TRIBE; ASSINIBOINE AND SIOUX TRIBES OF THE FORT PECK INDIAN RESERVATION; PUEBLO OF SANTA ANA; CHEYENNE RIVER SIOUX TRIBE; JICARILLA APACHE TRIBE; CALIFORNIA INDIAN LEGAL SERVICES; MONTANA LEGAL SERVICES ASSOCIATION; COUNCIL OF ENERGY RESOURCE TRIBES; PUEBLO OF LAGUNA; MESCALERO APACHE TRIBE IN SUPPORT OF RESPONDENTS

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Respondents.

On Writ of Certiorari to the United States Court of Claims

BRIEF OF AMICI CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF AMICI

This brief is submitted with the written consent of all parties to the case, lodged with the Clerk.

Amici Shoshone Tribe of the Wind River Indian Reservation, Standing Rock Sioux Tribe, Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, Pueblo of Santa Ana, Cheyenne River Sioux Tribe, Jicarilla Apache Tribe, Pueblo of Laguna and Mescalero Apache Tribe are federally recognized Indian Tribes, with important trust assets which are controlled and managed by the United States. Amicus Council of Energy Resource Tribes is a coalition of 34 energy resource owning Tribes. Amici California Indian Legal Services and Montana Legal Services Association presently represent numerous Indian bands and individuals which have similar interests in this case. All Amici have an interest that the United States not be permitted to evade liability when it breaches statutory duties and mismanages Indian trust assets.

SUMMARY OF ARGUMENT

In *United States v. Mitchell*, 445 U.S. 535 (1980) (*Mitchell I*), this Court held that the Indian General Allotment Act of 1887 [1]—an act designed to turn ownership and administration of Indian property over to individual Indians—could not fairly be read as providing a monetary recovery for allottees if the United States mismanaged their property. The Court emphasized that the predominant purpose of the 1887 Act was to encourage Indians to manage their own property, and that the Act consequently imposed only a "limited" trust responsibility on the United States, which did not include any duty to manage trust timber. 445 U.S. at 542.

The Court expressly reserved the question of whether several subsequent federal statutes—which "reversed [the] general policy" of the Allotment Act, "directing the Secretary on how to manage Indian timber resources," 445 U.S. at 545-546—did render the United States liable in money damages for mismanagement of allotted timber lands. This question was remanded to the Court of Claims. *Id.* at 546, n.7.

Subsequent to *Mitchell I*, this Court had occasion to consider the government's management responsibilities under those very timber management statutes enacted subsequent to the General Allotment Act and reversing its policy. In *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980), the Court held that under those statutes, "the Federal Government's regulation of the harvesting of Indian timber is comprehensive" and "takes the form of Acts of Congress, detailed regulations promulgated by the Secretary of the Interior, and day-to-day supervision by the Bureau of Indian Affairs." Under these timber management statutes, the United States has thus assumed full management and control over the sale of Indian timber. These statutes have imposed full fiduciary responsibilities on the United States for its man-

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[1] 24 Stat. 388, as amended, 25 U.S.C. § 331 *et seq.*

agement of Indian timber resources. They may thus fairly be read as allowing Indian beneficiaries a monetary recovery if the trustee mismanages the trust asset. See *Mitchell I*, *supra* at 542.

In the last 80 years Congress has also deliberately and expressly removed impediments to suit by Indians for money judgments for mismanagement. Prior to 1946, tribes were precluded from bringing suit in the Court of Claims.[2] Congress, however, regularly passed special statutes conferring jurisdiction on the Court of Claims to hear and decide Indian claims that executive officials mismanaged trust assets, including timber. These special jurisdictional acts did not by their language create causes of action for damages, but simply authorized suits in the Court of Claims for breaches of statutory and other duties owed to Indians. Even though the substantive treaties and statutes under which the suits arose did not expressly waive sovereign immunity, they were consistently and invariantly construed as authorizing suits for damages in cases decided under the special jurisdictional acts.

Congress in 1946 enacted 28 U.S.C. 1505 as part of the Indian Claims Commission Act. In Section 1505, Congress intended generally to waive sovereign immunity for claims against the United States by Indians, including those "arising under" any Act of Congress. A major purpose of Section 1505 was to eliminate the need for Congressional consideration and passage of special jurisdictional acts.[3] This parallel history of the predecessor

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[2] Tribes were barred from bringing claims for money damages against the United States under the Act of March 3, 1863, c. 92, § 9, 12 Stat. 766.

[3] By its terms, 28 U.S.C. 1505 applies only to Tribal claims, which comprise the vast majority of Indian claims. Even assuming that the 1863 Act applied to bar claims by individual Indians, there is no such bar now extant. The settled jurisprudence is that individual Indian claims may be brought directly under the Tucker Act. E.g., *Hebah v. United States*, 428 F.2d 1334 (Ct. Cl. 1970).

special jurisdictional acts and the more general conferral of jurisdiction in Section 1505 reveals that Congress has waived sovereign immunity in suits for damages where Congress has by statute assumed control and management over Indian property.

The twin prerequisites for prosecuting a claim for money damages against the United States are: (1) that there be a substantive statute that can fairly be interpreted as giving rise to the cause of action; and (2) that Congress has waived the United States' immunity from suit. These requirements are satisfied here. The Tucker Act and Section 1505, like the special jurisdictional acts before them, waive the government's sovereign immunity. And the Indian timber management statutes which—unlike the General Allotment Act—provide full federal control and trusteeship over Indian timber resources, create the cause of action.

The government seeks to avoid liability because the timber management statutes do not specifically waive the government's immunity from suit or state expressly that a money judgment may be awarded for their breach. In effect, the government would require two waivers of its immunity from suit—one in the Tucker Act or Section 1505, and a second in the substantive statute creating the right of action. This has never been the law. Decades of settled jurisprudence, in claims against the United States by Indians and non-Indians alike, teach that recovery is permitted when executive officials transgress rights protected by statute or treaty so long as a separate act (like the Tucker Act) waives the government's immunity from suit. E.g., *United States v. Gerlach Live Stock Company*, 339 U.S. 725 (1950); *Seminole Nation v. United States*, 316 U.S. 286 (1942). The present case is not a situation like *United States v. Testan*, 424 U.S. 392 (1976) or *Mitchell I* where the substantive statutes on which the claims were based could not be fairly read as creating causes of action for money damages. The Indian timber management statutes do not preclude judicial

review or restrict monetary relief to enumerated and limited wrongs. Instead, they assume comprehensive control over Indian trust property. In such circumstances, this Court and other courts have always permitted the Indian trust beneficiaries to recover money damages for violation of statutory and trust obligations, so long as a separate statute confers jurisdiction upon a federal court.

ARGUMENT

I. CONGRESS, REVERSING THE POLICY OF THE GENERAL ALLOTMENT ACT, HAS CHARGED THE SECRETARY OF THE INTERIOR WITH COMPREHENSIVE DAY-BY-DAY MANAGEMENT OF INDIAN TRUST TIMBER, ESTABLISHING A FULL TRUST DUTY IN THE SECRETARY.

In *Mitchell I* the Court considered "the question whether the Indian General Allotment Act of 1887 authorizes the award of money damages against the United States for alleged mismanagement of forests located on lands allotted to Indians under that Act." 445 U.S. at 536. The Court concluded that the 1887 Act did not "impose any duty upon the Government to manage timber resources" on allotted lands. *Id.* at 542. Rather, the purpose of the 1887 Act was to encourage "the Indian allottee, and not a representative of the United States," to use allotted land "for agricultural and grazing purposes." *Id.* at 542-543.[4] The allottee was to occupy the land,

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[4] The Allotment Act of 1887:

> permitted the President to make allotments of reservation lands to resident Indians and, with tribal consent, to sell surplus lands. Its policy was to continue the reservation system and the trust status of Indian lands, but to allot tracts to individual Indians for agriculture and grazing. When all the lands had been allotted and the trust expired, the reservation could be abolished. Unallotted lands were made available to non-Indians with the purpose, in part, of promoting interaction between the races and of encouraging Indians to adopt white ways.

Mattz v. Arnett, 412 U.S. 481, 496 (1973). See generally D. Otis, *The Dawes Act and the Allotment of Indian Lands* (1973).

learn to become a farmer or rancher, and become responsible for his own affairs. As this Court aptly put it, "the allottee, and not the United States, was to manage the land." 445 U.S. at 543. Accordingly, the Court held, the General Allotment Act "cannot be read as establishing that the United States has a fiduciary responsibility for management of allotted forest lands." *Id.* at 546.[5]

But as this Court recognized in *Mitchell I*, Congress later "reversed its general policy," 445 U.S. at 545. In this century, "Congress subsequently enacted other legislation directing the Secretary on how to manage Indian timber resources," *id.* at 546, and has now assumed full responsibility for management of Indian lands and timber. "The Federal Government's regulation of the harvesting of Indian timber is comprehensive" and has for decades included "day-to-day supervision by the Bureau of Indian Affairs" over all timber transactions under "detailed regulations promulgated by the Secretary of the Interior." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 145 (1980).

As the Solicitor General admits here (U.S. Br. p. 3), "[t]he forest resources on the allotted lands have been managed by the Department of the Interior, which has sold the timber from individual allotments and managed the revenue from the sales." This is not simply federal regulation, but federal management of property belonging to Indians, not a limited trusteeship as in the General Allotment Act, but a true trustee/beneficiary relation-

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[5] In part because the General Allotment Act originally contemplated requiring Indians to work their own allotments, timber sales were not authorized. Even leasing allotments to assure their productive use was initially prohibited *since that would discourage labor by the allottee.* When Congress began to authorize the leasing of allotments in 1891—even in the limited circumstances where the allottee could not work due to age or disability—there was strong opposition. See Act of Feb. 28, 1891, c. 383, § 3, 26 Stat. 795. Senator Dawes—sponsor of the General Allotment Act—vigorously opposed leasing on the ground that it would encourage the Indians not to work. *Otis, supra* at 108.

ship. The three principal Indian timber management statutes (discussed below) which establish this trust management relationship thus stand in sharp contrast to the General Allotment Act. These Acts, unlike the Court's reading of the Allotment Act in *Mitchell I*, should be read to provide a monetary remedy for breach of the government's trust responsibility.

A. *The Act of June 25, 1910, established federal management of timber allotments.* In 1910, Congress enacted an important omnibus bill on Indian affairs, which included the first general Indian timber sale provisions. Act of June 25, 1910, c. 431, 36 Stat. 855, as amended, 25 U.S.C. 406-407. Sponsors of this Act recognized that the United States must not simply give the Indians individual allotted tracts of land but must serve as trustee for the Indians who "are the wards of the Nation." 45 Cong. Rec. 6081 (1910) (Remarks of Rep. Sulzer). Congress in that statute "recognized the chaos in Indian affairs which had been brought about by allotment. The result was a spelling out of new federal trust responsibilities with respect to individual Indian property and definition of that responsibility for tribal lands." E. Spicer, *A Short History of the Indians of the United States*, p. 125 (1969). The 1910 Act constituted a "most important revision of the General Allotment Act." F. S. Cohen, *Handbook of Federal Indian Law*, p. 81 (G.P.O. 1942).[6]

Sections 7 and 8 of the 1910 Act contemplated active federal management of all Indian timber production

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[6] See also J.P. Kinney, *A Continent Lost, A Civilization Won: Indian Land Tenure in America*, p. 249 (1975 ed.). "The Act of June 25, 1910, (36 Stat. 855) contained so many items of legislation of vital importance to the Indians and included features of so marked a departure from previous policy that the fiscal year beginning July 1, 1910 may appropriately be accepted as the first in a new period in Indian administration."

whether on allotments or not.[7] As this Court stated in *Mitchell I*, 445 U.S. at 545:

> In 1910, Congress reversed its general policy. It empowered the Secretary of the Interior to sell timber on unallotted lands and apply the proceeds of the sales, less administrative expenses, to the benefit of the Indians. Ch. 431, § 7, 36 Stat. 857, as amended, 25 USC § 407. The Secretary was also authorized to consent to the sale of timber by the owner of any Indian land "held under a trust or other patent containing restrictions on alienations." *Id.*, § 8.

The legislative history of the 1910 Act reflects Congress' deliberate intention to provide for control of Indian timber by skilled federal officials to provide maximum benefit for the Indians. Congress was aware in 1910 of the heavy monetary loss to the Indians caused by federal mismanagement of the forest of the Menominee Reservation, in particular the failure of the United States in 1905 to market vast quantities of blown down timber before it went bad. 45 Cong. Rec. 6085 (1910) (remarks of Rep. Mann).[8] Debate on the timber provisions of the 1910 Act focused on how best to avoid such mismanagement in the future.

An amendment was proposed to have the Secretary of Agriculture, through the Forest Service, manage the In-

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[7] Prior timber statutes had dealt with particular reservations. E.g., Act of January 14, 1889, c. 24, §§ 4-6, 25 Stat. 642 (Chippewa); Act of March 28, 1908, c. 111, 35 Stat. 51 (Menominee).

The 1910 Act markedly expanded the Government's role in managing allotted lands in other respects. Leasing of *all* allotments for farming or grazing, previously so tightly constrained by statute, see n. 5, *supra*, was broadly authorized. § 4. Inducing Indians to execute conveyances of allotments, and unlawfully cutting, taking or setting fire to timber on Indian lands were made criminal offenses. *Id.*, § 6.

[8] The United States was later held liable for mismanaging the blown down timber. *Menominee Tribe v. United States*, 101 Ct. Cl. 22 (1944).

dian forests.[9] Other Congressmen, however, favored the Indian Service:

> Mr. Burke: [The Indian Service has] men who are regarded as experts on timber, and I presume if this law is enacted, there will be no live timber, at least, cut until it has been inspected by men who are competent * * *. 45 Cong. Rec. 6086 (1910).

On both sides of this debate was the common ground that "we ought to provide for the harvesting of this ripe timber in such a manner as to conserve the interests of the people on the reservations, namely, the Indians." 45 Cong. Rec. 6087 (1910) (Remarks of Rep. Saunders). Congress in the 1910 Act ultimately opted for the Interior Department to manage the Indian timber.

The Interior Department immediately recognized its comprehensive duty to manage the forests so as to produce the best revenue for the Indians. In 1911, the Interior Department issued "Regulations and Instructions For Officers in Charge of Forests on Indian Reservations" (hereinafter "1911 Regs."). These regulations set up specific obligations and duties of federal officials "in so managing the Indian Forests as to obtain the greatest revenue for the Indians consistent with a proper protection and improvement of the forests." 1911 Regs., p. 4. The regulations provided great detail with respect to virtually every aspect of forest management: guarding against trespass (p. 5) and fire (p. 6); limiting open market sales (p. 13); establishing competitive advertising procedures (p. 14); requiring deposits (p. 14); setting terms of payment (p. 15), bonds (p. 16) and administrative expenses (p. 16); regulating sale of the timber of minors (p. 17), allowable stump heights (p. 18), burning of brush (p. 19), marking (p. 19), scaling (p. 21) and so forth. These regulations were by their terms fully applicable to allotted, as well as tribal lands, and

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[9] The amendment was passed by the House, 45 Cong. Rec. 6087-88, but deleted in conference without comment.

the Secretary's approval of timber sales on allotted lands was explicitly conditioned upon compliance with the regulations (p. 9).[10]

B. *The Indian Reorganization Act of 1934, 25 U.S.C. 461 et seq. formally ended the allotment policy.* In 1934, Congress enacted the Wheeler-Howard Indian Reorganization Act, c. 576, 48 Stat. 984, codified at 25 U.S.C. 461 *et seq.* ("IRA"), one of the most important pieces of Indian legislation in American history.[11] The Act was among other things designed to remedy "[t]he continued application of the allotment laws, under which Indian wards have lost more than two-thirds of their reservation lands . . . ." Letter of President Roosevelt to Honorable Burton K. Wheeler, April 28, 1934, S. Rep. No. 1080, 73rd Cong., 2d Sess., p. 4.[12]

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[10] We are lodging a copy of these regulations with the Clerk.

[11] In the view of Felix S. Cohen, recognized by this Court as the paramount scholar in Indian law (see *Squire v. Capoeman*, 351 U.S. 1, 8-9 and n.15 (1956)) this Act is "equalled in scope and significance only by the legislation of June 30, 1834, and the General Allotment Act of February 8, 1887." F. S. Cohen, *Handbook of Federal Indian Law*, p. 84 (G.P.O. 1942). This treatise, revised in 1982, remains the major work of scholarship on Indian law today.

[12] A comprehensive explanation of the Act's purpose to reverse the policy of the General Allotment Act is found in the statement of its co-sponsor, Representative Howard of Nebraska, Chairman of the House Committee on Indian Affairs:

> The general allotment act of 1887 sought to substitute individual, private ownership of Indian land for tribal ownership. It provided for the parceling of the Indian reservations into small individual allotments and the issuance of trust deeds to all the enrolled members of the tribe * * *. 78 Cong. Rec. 11727 (1934).

Representative Howard decried the effect of the allotment act:

> As a result of this system, the allotted Indian reservations are in general riddled by alienations, the extent of the alienation being almost exactly proportionate to the length of time since the original allotment was made. The Indians of many tribes have lost practically every square foot of land they owned. Many reservations have in Indian ownership a mere fragment of the original land * * *. 78 Cong. Rec. 11728 (1934).

As part of the IRA, Congress imposed even stricter duties upon the government with respect to Indian trust timber management than those found in the 1910 act. Section 6 of the IRA required the Secretary of the Interior "to make rules and regulations for the operation and management of Indian forestry units on the principle of sustained-yield management . . . ." 25 U.S.C. 466. The purpose of this provision was "to assure a proper and permanent management of the Indian Forest" under modern sustained-yield methods to "assure that the Indian forests will be permanently productive *and will yield continuous revenue to the tribes.*" 78 Cong. Rec. 11730 (1934) (remarks of Rep. Howard) (emphasis added). As Congressman Howard observed:

> The failure of their [the Indians'] governmental guardian to conserve the Indians' land and assets and the consequent loss of income or earning power, has been the principal cause of the present plight of the Indian." 78 Cong. Rec. 11726 (1934).

Congressman Howard noted that the purpose of the IRA was to establish the government's relationship to the Indians as "one of sacred trust. The proper administration of that trust is a matter which is vital to the Indian." 78 Cong. Rec. 11726. In terms of forest management, the Act was explicit in defining the purpose of the trust *vis a vis* forests: to yield continuous economic return by the government's forest management of Indian lands.

In hearings before Congress when it was considering the IRA, John Collier, President Roosevelt's Commissioner of Indian Affairs and a principal author of the Act, testified about problems of timber mismanagement and resulting claims against the United States. He advised Congress that on the Menominee Reservation in Wisconsin, "much of their [the Menominees'] timber was devasted, *and as a result, they have a claim against the Government, an assertable and collectible claim* * * *." That claim was understood to arise because "they were

protected by a specific direction from Congress that the timber should be operated on a perpetual yield basis." [13] Commissioner Collier's testimony indicated his and Congress' understanding that under the IRA and prior legislation the United States, as in the Menominee case, could be held accountable in damages for violations of the federal sustained-yield management duties in the Act. Later Commissioner Collier's characterization of the Menominee claim was proven correct. The Menominees recovered money damages against the United States for timber mismanagement. *Menominee Tribe v. United States*, 101 Ct. Cl. 22 (1944).

C. *The 1964 Amendments to the 1910 Act (78 Stat. 186), increased federal control over and responsibility for tribal and allotted timber lands.* In 1964 Congress amended the 1910 Act's timber provisions and again emphasized the duty of the Secretary to manage the property so as to produce income for the Indians. As to allotted lands, the Secretary was directed when making timber sales to consider "the needs and best interests of the Indian owner and his heirs." 25 U.S.C. 406. To fulfill this overriding duty to the Indians, the statute required the Secretary to consider:

> (1) the state of growth of the timber and the need for maintaining the productive capacity of the land for the benefit of the owner and his heirs, (2) the highest and best use of the land, including the advisability and practicality of devoting it to other uses for the benefit of the owner and his heirs, and (3) the present and future financial needs of the owner and his heirs. *Id.*

Moreover, and importantly, the 1964 Amendments allowed the Secretary to charge the Indians a fee for his management of their property. Act of April 30, 1964, § 8(a), 78 Stat. 186. The Secretary thus was not only a

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[13] Hearings on H.R. 7902 Before the House Committee on Indian Affairs, 73rd Cong., 2d Sess., pt. 4 at 131 (emphasis added).

full fledged trustee, but one paid for his services, not fundamentally different from a bank or management company hired as a trustee.

As we show in Part IV below, these three Indian timber management statutes can only fairly be read as creating a cause of action for money damages under the rule of *United States v. Testan*, 424 U.S. 392 (1976). Here, unlike the statutes in *Testan*, the timber management statutes do not preclude or limit judicial review to foreclose monetary compensation. Here, moreover, the historic practice (which we describe in Part III) has been to permit monetary recovery where executive officials have mismanaged Indian property that Congress has directed them to control. This is the only sound and sensible result where Congress has undertaken to control and manage as a trustee the property of another. The executive officials charged with management, not the trust beneficiary, control the property, know the details of its management, and must—by the same token—fairly respond by making the beneficial owner of the property whole when they fail to perform their responsibilities as set by Congress.

II. THE HISTORY OF ACTS GRANTING INDIANS ACCESS TO FEDERAL COURTS—LIKE THE HISTORY OF THE INDIAN TIMBER MANAGEMENT STATUTES—REVEALS THAT CONGRESS HAS CONSISTENTLY WAIVED THE IMMUNITY OF THE UNITED STATES TO PROVIDE A MONEY DAMAGE REMEDY FOR INDIANS WHERE THE GOVERNMENT BREACHES ITS STATUTORY DUTY TO MANAGE INDIAN TIMBER.

Contemporaneously with the Indian timber management statutes, Congress established the practice of waiving the immunity of the United States from suit whenever Indian tribes advanced reasonable claims that executive officials had violated treaties or statutory obligations concerning management of Indian property. Congress

first did this by enacting special jurisdictional acts allowing individual tribes to file particular claims against the United States in the Court of Claims. Several such claims involved timber mismanagement. See pp. 15-16, *infra*. Then, in 1946, Congress generally authorized all Indian tribes to sue the United States in the Court of Claims for, *inter alia*, claims "arising under the * * * laws * * * of the United States." We discuss this process below to show that the Court of Claims clearly has jurisdiction over the causes of action arising under the Indian timber management statutes.

A. *Practice under special jurisdictional acts.* In the early part of this century, Indian tribes were generally barred from bringing claims against the United States in the Court of Claims. *See* Act of March 3, 1863, c. 92, § 9, 12 Stat. 766. In the decades prior to 1946, Congress repeatedly enacted special jurisdictional acts when Indians sought redress for grievances, including mismanagement of timber resources.[14] For instance, the government was required to manage the Indian timber on the Menominee Reservation under the Act of June 12, 1890, c. 418, 26 Stat. 146, applicable only to the Menominees. In 1905, a severe windstorm blew down millions of feet of valuable trust timber. Despite the urgency to process the blown down timber before it rotted, the government hired loggers to cut, not the blown down timber, but other, live, timber. Then, the government sold the timber in a manner other than that prescribed by Congress. Congress permitted suit against the United States by a special jurisdictional act of September 3, 1935, c. 839, 49 Stat. 1085, as amended, c. 12, 52 Stat. 208, and the United States was held liable for this maladministration. *Menominee Tribe v. United States*, 101 Ct. Cl. 22, 30 (1944).

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[14] Between 1886 and 1946, Congress enacted well over 100 such special jurisdictional statutes. A compilation of most of these acts is found in F. S. Cohen, *Handbook of Federal Indian Law*, pp. 374-376 (G.P.O. 1942).

The substantive Menominee timber act imposing the fiduciary duty (the 1890 Act) did *not* speak of money damages nor did it specifically waive federal immunity from suit. The special jurisdictional statute did not create a cause of action, but simply provided that "jurisdiction is hereby conferred on the Court of Claims to hear, determine, adjudicate, and render final judgment" on the legal and equitable claims of the Menominees arising out of various statutes and treaties which were then listed. The United States' liability, therefore, arose under the 1890 statute giving duties of management to the United States, and depended for enforcement only upon a statute giving jurisdiction to the Court of Claims. This process—a jurisdictional act waiving immunity of the United States from suit and a substantive statute giving rise to a cause of action once immunity is waived—is repeated in other Indian claims cases against the United States.[15]

Similarly, the Act of January 14, 1889, 25 Stat. 642, c. 24, §§ 4, 5 and 7, required the Secretary of the Interior to have certain Indian lands surveyed and valued for timber, and then sold with the proceeds (less expenses) deposited in the Treasury for the benefit of the Chippewa Indians. The Secretary knowingly appointed "inexperienced and incompetent examiners and estimators", many of whom never went onto the land. *Chippewa Indians v. United States*, 91 Ct. Cl. 97, 130 (1940). The Indians

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[15] The United States was held liable in a second case as well for later mismanagement of the Menominee forest. In 1908, following the storm, Congress enacted a new bill governing forestry on the Menominee Reservation—the Act of March 28, 1908, 35 Stat. 51—which "had as one of its purposes, equal in importance to the others, the preservation of the Menominee forest in such a way that it would provide a continuing source of income to the Indians who could not, if its resources were depleted, move on to another forest." *Menominee Tribe of Indians v. United States*, 117 Ct. Cl. 442, 499 (1950). The Government subsequently, contrary to the Act, authorized clear cutting and failed in other duties of good management. Id. at 507.

therefore, did not receive fair value for their timber. Under a special jurisdictional act (Act of May 14, 1926, c. 300, 44 Stat. 555), authorizing the Chippewas to bring "any and all legal or equitable claims arising out of the 1889 Act or later Acts of Congress," the Chippewa Indians brought an action and the United States was held liable for mismanaging the timber. *Chippewa Indians supra* at 134.[16] As with the Menominee Act, the substantive 1889 Act contained no statement by Congress that the United States would be liable in money damages if its statutory duties to manage Chippewa timber were breached.

B. *History of the 1946 statute, 28 U.S.C. 1505.* By 1946, Congress had become concerned about the "vast and growing burden" placed upon it by the large number of tribes seeking special jurisdictional acts. H.R. Rep. No. 1466, 79th Cong., 1st Sess., p. 6. Because of the "complexity of Indian cases" and other factors, Congress simply could not give prompt and full consideration to all the Tribes coming before it. *Id.* Congress concluded that the "pernicious effect of long delay and the denial of justice" in the special jurisdictional act system had to be stopped. *Id.*

Accordingly, Congress in 1946 enacted the Indian Claims Commission Act. In this Act, Congress adopted a two-fold scheme. First, to "secure the most expeditious and economical disposition of this great backlog of Indian cases", 92 Cong. Rec. 5312 (1946) (remarks of Rep. Jackson), Congress established an Indian Claims Commission to adjudicate all Indian claims arising on or before August 13, 1946, the date of enactment. Second, for Tribal claims arising after that date, consent was given to suits in the Court of Claims in Section 24, now partially codified as 28 U.S.C. 1505.

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[16] The award, however, was offset by claims of the United States. *Chippewa Indians supra*, at 138.

Section 24 was intended to open the courthouse doors to future Indian claims, by removing the impediment to Tribal claims under the Tucker Act contained in the Act of March 3, 1863, c. 92, § 9, 12 Stat. 766. The Tucker Act itself, now 28 U.S.C. 1491, was understood by Congress and definitively construed by this Court at the time Congress passed the 1946 Act as waiving sovereign immunity for non-Indian cases in the Court of Claims. In *United States v. Sherwood*, 312 U.S. 584 (1940), this Court noted that the Tucker Act "must be interpreted in light of *its function in giving consent of the Government to be sued, which consent, since it is a relinquishment of sovereign immunity*, must be strictly construed." 312 U.S. at 590 (emphasis added).[17] Congress therefore incorporated this understanding of the Tucker Act into 28 U.S.C. 1505 and waived the immunity of the United States for all Indian claims to be brought in the Court of Claims based on violations of substantive rights protected by other contractual, statutory or constitutional provisions. See *Lorrillard v. Pons*, 434 U.S. 575, 581 (1978).[18]

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[17] That the Court was correct in *Sherwood* is made clear by the legislative history of the Tucker Act. See e.g., 18 Cong. Rec. 622, 2679, 2680 (1887) (remarks of Reps. Tucker, Townsend, Bayne).

[18] When it enacted the 1946 Act, including Section 1505, Congress was careful to preserve prior law concerning the fiduciary duties of the United States to Indians. Part of Section 24 of the Indian Claims Commission Act, not codified, provides that:

> nothing contained in this section shall be construed as altering the fiduciary or other relations between the United States and the several Indians Tribes, bands or groups.

The uncodified portion of the statute also describes the breadth of Section 1505:

> In any suit brought under the jurisdiction conferred by this section the claimant shall be entitled to recover in the same manner, to the same extent, and subject to the same conditions and limitations, and the United States shall be entitled to the same defenses, both at law and in equity, and to the same off-

Consistent with its goals, Congress acted even more broadly in authorizing suits before the Indian Claims Commission than in the Court of Claims for wrongs occurring after 1946. With respect to the Indian Claims Commission, Congress consented to suit as to "all possible claims." 92 Cong. Rec. 5312 (1946) (remarks of Rep. Jackson). This included not simply money damage suits based on legal or equitable principles, but those based on moral considerations as well. See 25 U.S.C. 70a.[19] For claims arising after August 13, 1946, consent to suit in the Court of Claims encompassed all claims at law and in equity, but not purely moral claims. See Hearings before the Committee on Indian Affairs on H.R. 1198 and H.R. 1341, 79th Cong., 1st Sess., June 14, 1945, p. 149. ("Moral, as distinguished from legal claims or offsets could not be considered.")[20]

Further, in opening the courthouse doors to Tribes, Congress was well aware that many Indian claims arose from the mismanagement of Indian trust assets by the government, including timber. Throughout the legislative history of the Indian Claims Commission Act there are statements acknowledging the duties of the government,

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sets, counterclaims, and demands, as in cases brought in the Court of Claims under Section 145 of the Judicial Code (36 Stat. 1136; 28 U.S.C. Sec. 250) [now 28 U.S.C. 1491].

[19] The consent to be sued on moral claims would give Indians their day in court where a mistake was made in writing out the agreed terms of a treaty (92 Cong. Rec. 5313 (1946)); where Indians agreed to cede their land but Congress failed to ratify the treaty of cession (Hearings Before the Committee on Indian Affairs, United States Senate on the Indian Claims Commission Act, 79th Cong., 2nd sess., July 13, 1946, pp. 56-58); and where justice required revision of unfair treaties. See *Choctaw Nation v. United States*, 318 U.S. 423 (1942).

[20] Since non-Indians of course cannot bring purely moral claims under the Tucker Act, 28 U.S.C. 1505 excluded these, thus giving Indians authority to sue on any "claim of a character which would be cognizable in the Court of Claims if the claimant were not an Indian Tribe." H.R. Rep. No. 1466, 79th Cong., 1st sess., 13.

as trustee, properly to manage Indian property. Thus, the House Committee Report stated:

> If we fail to meet these obligations by denying access to the courts when trust funds have been improperly dissipated or other fiduciary duties have been violated, we compromise the national honor of the United States. H.R. Rep. No. 1466, *supra* at 5.

Congressman Jackson, House sponsor of the bill, stated:

> The Interior Department itself has suggested that it ought not be in a position where its employees can mishandle funds and lands of a national trusteeship without accountability.
>
> * * * *
>
> [L]et us see that the Indians have their fair day in Court so that they can call the various Government agencies to account on the obligations that the Federal Government assumed. 92 Cong. Rec. 5312 (1946).

Indeed, the case of mismanagement concerning the blown down timber on the Menominee Reservation was cited as an example of the type of case for which the Indians needed access to the courts.

> On July 16, 1905, a heavy storm on the Menominee Indian Reservation threw down a large stand of timber, which the Indian bureau had undertaken to harvest. The Indians claimed that the Indian service had failed to carry out its obligation to dispose of down timber at its true value . . . [The Court of Claims found] that it was largely justified and awarded a judgment in favor of the Menominee Indians. H.R. Rep. No. 1466, supra, p. 4.

In the 1946 Act, therefore, Congress recognized the government's fiduciary obligations to Indians,[21] consented to cases brought by Indians for breach of those duties, and vested the Court of Claims with jurisdiction to hear

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[21] See n. 18, *supra*.

these cases. The fundamental thrust of Section 1505 was to provide the Court of Claims with jurisdiction over Indian claims so that it would "never again be necessary to pass special Indian jurisdictional acts * * *" in order for Indians to bring actions—including mismanagement actions—against the United States. 92 Cong. Rec. 5313 (remarks of Rep. Jackson). Section 1505 was intended to replace—on an across-the-board basis—the special jurisdictional statutes that had been necessary to bring cases before 1946. Although neither Section 1491 nor Section 1505 was intended to create any substantive rights, they were both intended to provide consent and jurisdiction where a valid cause of action had been created by another statute. And it was well understood by Congress that substantive treaties and statutes directing federal control over Indian property had always been construed to create a cause of action for money damages. Section 1505 and the Tucker Act were intended—and should now be construed—to allow such a cause of action to be adjudicated in the Court of Claims. To hold otherwise would in effect require a return to the special jurisdictional act system. Individual tribes would have to return to Congress, seeking special acts to authorize suits to vindicate their claims against the government. That is precisely the result Section 1505 was intended to prevent.

III. THE GOVERNMENT'S CONTRARY POSITION—THAT BOTH THE TUCKER ACT AND THE SUBSTANTIVE STATUTE UNDER WHICH THE CAUSE OF ACTION ARISES MUST WAIVE SOVEREIGN IMMUNITY—IS CONTRARY TO SETTLED JURISPRUDENCE.

Although the government seemingly concedes that the Tucker Act waives the sovereign immunity of the United States, U.S. Br., p. 18, n.12, it nonetheless repeatedly asserts that the claims in this case must fail because none of the Indian timber management statutes contain any "'unequivocally expressed' consent to suit." U.S. Br. 29;

and see id. at 18; 20; 21; 22, n.15; 24, n.17; 25; 26; 27, n.22, 28; 30; 33; 38; 41; 43; 44; 46; 48. In essence, the government is saying that even though the Tucker Act provides the necessary consent of the sovereign for maintenance of a suit within its terms, a substantive act of Congress on which a given claim is alleged to be founded must be construed strictly, as if one had to find *in that substantive act* a *second* consent to suit.

That argument is patently erroneous, and contrary to decades of decisions in cases brought against the United States by Indians and non-Indians alike. These cases have never construed substantive statutes and treaties strictly against allowing a cause of action against the United States *once sovereign immunity has been waived* (as by the Tucker Act). Substantive, remedial statutes like the Indian timber statutes are construed broadly to effectuate their purposes. *Tcherepin v. Knight*, 389 U.S. 332, 336 (1967); *Peyton v. Rowe*, 391 U.S. 54, 65 (1968). This is particularly so of statutes pertaining to protection of Indian property. *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 656, n.7 (1976); *Antoine v. Washington*, 420 U.S. 194, 199 (1975); *Squire v. Capoeman*, 351 U.S. 1, 6-7 (1956); *Carpenter v. Shaw*, 280 U.S. 363, 367 (1930).

A leading case involving non-Indian claimants is *United States v. Gerlach Live Stock Company*, 339 U.S. 725 (1950). In *Gerlach*, this Court held the United States liable for damages to the riparian rights of landowners caused by Friant Dam, a federal water project. The landowners claimed that the dam cut off the river's naturally occurring seasonal overflow, which had benefitted their riparian grasslands. Congress had never in any substantive statute expressly waived the immunity of the United States to suits for money damages. Rather, Congress had simply provided, in the 1902 Reclamation Act and

subsequent appropriations for the Friant Dam project, that state water rights were recognized as valid. The 1902 Reclamation Act and subsequent statutes were not "monetary" in character. Nonetheless, since valid state law riparian rights were impaired by the dam, and the immunity of the United States from suit had been separately waived, the United States was held liable in damages.[22]

The inference that Congress intended to permit monetary liability is far stronger in the Indian context where the Secretary of Interior is expressly charged by Congress with managing the property of another, than in a case like *Gerlach* where, in the substantive statute, Congress had merely recognized the validity of rights arising under state water law.

A leading Indian case is *Seminole Nation v. United States*, 316 U.S. 286 (1942). The Tribe claimed the United States had breached an obligation to pay to the Indians interest on a trust fund as required by an 1856 Treaty. The money had in fact been paid—in a manner prescribed by the Seminole tribal counsel itself. Nevertheless, this Court ruled that the United States could be held liable because the manner of payment—on instruction from a tribal council known by the Government to be corrupt—was in violation of "the distinctive obligation of trust" required of the Government in its dealings with the Indians. *Seminole Nation v. United States*, 316 U.S. at 296.

As in the other cases discussed above, in *Seminole* the substantive treaty provision did not expressly waive the

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[22] In *Gerlach*, Congress could have taken the riparian rights without compensation, under the navigation servitude. See e.g., *United States v. Rands*, 389 U.S. 121 (1967). Even so, this Court did not require the explicit Congressional statement of liability the Government presses for here, but simply construed the congressional enactments fairly to see if they gave rise to a cause of action for damages. See p. 26, *infra*.

United States' immunity from suit or provide for damages or direct a second payment after the funds were once paid. Nevertheless the Court found the second payment the proper remedy to fulfill the United States' obligation under the Treaty, because Congress in the Treaty had charged the United States with managing the funds and property of the Tribe.

The United States contends that the *Seminole* case is distinguishable because it was brought under special jurisdictional acts providing the necessary consent to suit supposedly lacking in the Tucker Act or Section 1505. (U.S. Br. p. 47, n.38). The special jurisdictional act in *Seminole*, however, was merely a broad statement authorizing suit on "any and all legal and equitable claims arising under or growing out of any treaty or agreement * * * or arising under or growing out of any Act of Congress in relation to Indian Affairs * * *." Act of May 20, 1924, c. 162, 43 Stat. 133.[23] This provides no more specific consent to suit for particular money damage claims than those found in the Tucker Act or 28 U.S.C. 1505. As noted pp. 17-19, *supra*, Section 1505 is a replacement for the earlier special jurisdictional acts.[24]

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[23] This original jurisdictional act was amended in 1937 to authorize amended petitions after the expiration of the time allowed for filing in the 1924 Act. Act of Aug. 16, 1937, c. 651, 50 Stat. 650.

[24] The government seeks to distinguish *Seminole* on two other implausible grounds. First, the government contends that it never raised the argument that a money damage remedy was unavailable. (U.S. Br., p. 47 n. 38). This is simply an admission that the government has never before sought to expand its immunity from Indian money damage suits as broadly as it seeks to do here. The Court itself would of course have been bound to notice lack of jurisdiction due to the immunity of the United States if it had existed, whether it was raised or not by the parties.

Second, the government states that the claim in *Seminole* was to compel payments the United States promised to make—so that "no special jurisdiction provision would today be necessary." (U.S. Br., p. 47, n. 38). But *Seminole* was clearly *not* a case to require the

Like *Seminole*, *Gerlach* and the Menominee and Chippewa cases, numerous other cases have permitted recovery of money damages for violation of a statute or treaty that does not itself state that money damages shall be paid or waive the immunity of the United States to suit for damages. E.g., *United States v. Mason*, 412 U.S. 391, 394 n.5, 397 (1973) (specifically holding that claim that United States "breached its fiduciary duty" is cognizable under Tucker Act); *United States v. Omaha Tribe*, 253 U.S. 275 (1920) (United States liable for cattle purchased which were in poor condition and for hospitals which were unfit for use); *Navajo Tribe v. United States*, 364 F.2d 320 (Ct. Cl. 1966) (United States liable for mismanagement of Indian mineral lease); *Creek Nation v. United States*, 78 Ct. Cl. 474 (1933) (United States liable for erroneous bookkeeping entries); *Ute Indians v. United States*, 45 Ct. Cl. 440 (1910) (United States liable for land cession which was not a Fifth Amendment taking). This established line of jurisprudence would be reversed under the theory offered by the government here.[25]

United States to pay money it wrongfully retained. In *Seminole*, the payments had been made—but not in a manner consistent with the government's trust obligations assumed under the treaty.

[25] Another line of cases which could not withstand the government's analysis are the Tucker Act contract cases. When the United States breaches a contract it has entered—whether that contract is express or even implied-in-fact—it is liable in money damages under the Tucker Act. E.g., *United States v. Milliken Imprinting Co.*, 202 U.S. 168 (1903). Of course, the contract need not state that the United States intends to be held liable in money damages for any breach. All that is required is a breach of the contract, as consent to suit is provided in "the waiver of sovereign immunity in the Tucker Act." *Hatzlachh Supply Co. v. United States*, 444 U.S. 460, 466 (1980). There is simply no basis for requiring an additional expression of intent to authorize damage suits based on statutory—as compared with contract—claims.

IV. *TESTAN* SUPPORTS INDIAN CLAIMS AGAINST THE UNITED STATES FOR TRUST TIMBER MISMANAGEMENT.

United States v. Testan, 424 U.S. 392 (1976)—upon which the government primarily relies—actually supports recovery here.

In *Testan*, two federal employees brought an action in the Court of Claims under the Tucker Act, seeking reclassification of their jobs to higher pay scales, and back pay at the higher rates. The Court first noted that the Tucker Act does not "create any substantive right enforceable against the United States for money damages." *Id.* at 398. Therefore, the Court reviewed the applicable substantive federal statutes—the Classification Act, 5 U.S.C. 5101 *et seq.*, and the Back Pay Act, 5 U.S.C. 5596—to ascertain whether these statutes "confer a substantive right to recover money damages from the United States" for pay derived from a job never occupied. *Id.* The Court stated that:

> The basis of the federal claim—whether it be the Constitution, a statute or a regulation—does not create a *cause of action* for money damages *unless*, as the Court of Claims has stated, that basis, 'in itself . . . can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained'. *Eastport S.S. Corp. v. United States*, 178 Ct. Cl. at 607 * * *." *Id.* at 401-402 (emphasis added).

The Classification Act and Back Pay Act—unlike the Indian timber management statutes—could not meet this standard. The Back Pay Act's coverage provided monetary payments, but only to those who were wrongfully reduced in grade, suspended or terminated, not to persons who alleged they were entitled to the benefits of a higher grade. *Id.* at 405-406. The Classification Act provided administrative procedures for reclassification, but had no provision for back pay. Both statutes were construed in light of the "established rule" that "the

federal employee is entitled to receive only the salary of the position to which he was appointed." *Id.* at 402, 406.[26] Viewed in light of this historic practice of denying monetary compensation, the Court held that the plaintiffs had no cause of action for back pay for a position they never held.

Testan held that money damages are unavailable where —despite the waiver of sovereign immunity in the Tucker Act or another statute—Congress has in a substantive statute either precluded judicial review entirely or limited judicial review in such a way as to foreclose a monetary award. Accord *United States v. Erika, Inc.*, No. 80-1594, decided April 20, 1982.[27] *Testan* holds that "the asserted entitlement to money damages depends upon whether any federal statute 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.' *Eastport S.S. Corp. v. United States*, 178 Ct. Cl. at 607, 372 F.2d at 1009; *Mosca v. United States*, 189 Ct. Cl. 283, 290, 417 F.2d 1382, 1386 (1967), *cert. denied*, 399 U.S. 911 (1970)." *Testan*, *supra* at 400. As the cases relied upon in *Testan* show, the substantive statute upon which a Tucker Act claim is based *need not expressly state* that the United States can be held accountable in money damages. *Eastport S.S. Corp.*, 178 Ct. Cl. at 605 (the statute must "grant the

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[26] This rule, the Court held, was not changed or overruled by Congress in the Classification or Back Pay Acts. *Id.* at 402, 406.

[27] In *Erika*, Congress established a comprehensive administrative scheme for appealing initial determinations concerning 1) eligibility and 2) the amount of benefits—for both Medicare Part A and Part B. However, while the statute provided judicial review of determinations concerning eligibility for Part A or B, it limited judicial review of determinations concerning the *amounts* of benefits to Part A only. In *Erika*, this Court refused to upset the clear intention of Congress to rely exclusively on administrative remedies with respect to Medicare Part B amount determinations, and to preclude judicial review with respect to money damages.

claimant, expressly *or by implication*" a right to money damages) (emphasis added).

The present case squarely meets that test. This is not a case of government exercising a regulatory or discretionary function. The government is not acting as a law maker. It is not dealing with its own property or employees. Instead, the government is managing the property of Indians. It is doing this because Congress has determined that such comprehensive control and management is necessary to produce maximum benefit for the Indians. The Secretary even receives a fee for his services. The Indians are generally precluded from managing their own timber.

This—unlike the General Allotment Act—creates a full trust relationship. The Indian timber management statutes can only be fairly interpreted as imposing an obligation on the United States to respond in damages—as a private trustee would—if its management is so defective as to violate the standards set by Congress in assuming the trust. That has always been the law—both generally where trust arrangements are involved, and in the Indian field. Precisely because beneficiaries are deemed not capable of managing their own affairs, American law has always permitted actions by beneficiaries against trustees for damages for breach of trust.[28] Legions of Indian claims cases, including of course cases involving timber management discussed *supra* pp. 14-16, establish that where Congress has voluntarily assumed a fiduciary duty to control and manage Indian property, the United States is held liable in money damages if it fails to adhere to the fiduciary standards set by Congress (once Congress has waived sovereign immunity).[29]

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[28] *E.g.*, Bogert and Bogert, Handbook of the Law of Trusts (1973); Bogert and Bogert, Law of Trusts and Trustees (2d ed. 1965) 862; *Oliver v. Piatt*, 44 U.S. (3 How.) 333, 344 (1845).

[29] A leading Indian breach of trust case outside the timber management field is *United States v. Creek Nation*, 295 U.S. 103 (1935),

The government argues (U.S. Br. pp. 23-28) that the Indians should have a right only to injunctive relief, and not money damages. Whatever might be the appeal of the government's argument where merely governmental duties of federal officials are at stake, here the government has undertaken as trustee to manage the property of persons Congress has determined should not manage their own property. Damages, not injunctive relief alone, are necessary in these circumstances, because the beneficiary can be presumed not to be able to know of the mismanagement in advance. The government, not the Indian beneficiary, is charged with managing the property. Trusteeship means little if the *beneficiary* must supervise the day-by-day management of his estate by his trustee or be precluded from any recovery for mismanagement. A limitation to injunctive relief is thus a clever way

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where this Court affirmed a portion of a decision by the Court of Claims awarding the tribe money damages for lands which had been excluded from their reservation and sold to non-Indians pursuant to an incorrect federal survey of reservation boundaries. This Court bottomed its decision on the federal trust doctrine:

> The tribe was a dependent Indian community under the guardianship of the United States, and therefore its property and affairs were subject to the control and management of that government. But this power to control and manage was not absolute. While extending to all appropriate measures for protecting and advancing the tribe, it was subject to limitations inhering in such a guardianship and to pertinent constitutional restrictions. 295 U.S. at 109-110 (emphasis supplied).

Creek Nation stands for the proposition that where Congress has directed executive departments to control and comprehensively manage Indian property, the federal executive is held to a strict standard of compliance with fiduciary duties. Decisions of this Court reviewing the lawfulness of administrative conduct managing Indian property have held officials of the United States to "obligations of the highest responsibility and trust" and "the most exacting fiduciary standards," and to be bound "by every moral and equitable consideration to discharge its trust with good faith and fairness." *Seminole Nation v. United States*, 316 U.S. 286, 296-297 (1942); *United States v. Payne*, 264 U.S. 446, 448 (1924).

ex post facto to say no relief at all. This intent should not be imputed to Congress.

The government would only allow money damages where the government's duties under a statute are monetary. That test, however, is satisfied where Congress has directed executive officials to manage the private property of another. The Indian timber management statutes have a significant monetary element. The whole purpose of government timber management is to maximize income on a sustained basis for the Indian owner. This is entirely unlike a claim by a citizen for mismanagement of a national park or forest. Here the mismanagement directly reduces income to the plaintiff, depleting his private property. To restore that income through damages is the natural process and meets the only reasonable expectation of Congress when it assumed control of Indian timber. This Court cannot fairly infer that Congress undertook comprehensive control and management of Indian timber for the Indians' benefit, denied the Indians the control over their own timber, generally waived the immunity of the United States from suit and still intended the Indians to be without recourse in the event executive officials negligently deviated from their statutory and trust obligations.

CONCLUSION

The decision of the Court of Claims should be affirmed.

Respectfully submitted,

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Docket Sheet

NO. 81-1748-COX	TITLE	United States, Petitioner
SEE: 81-1747		v. Helen Mitchell, et al.

DOCKETED	COURT
Mar. 19, 1982	United States Court of Claims

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioner: Solicitor General
	Counsel for Respondents: Charles A. Hobbs
Jan. 8, 1982	Application for an extension of time to file petition for writ of certiorari and order granting same until March 20, 1982 by Burger, CJ, on Jan. 14, 1982.
Mar. 19, 1982	Petition for writ of certiorari filed. (Record filed).
Apr. 20, 1982	Order extending time for respondents to file a response to the petition until May 5, 1982.
May 5, 1982	Brief for the respondents in opposition filed.
May 12, 1982	DISTRIBUTED. 5-27.
June 1, 1982	REDISTRIBUTED. 6-3.
June 7, 1982	Petition GRANTED.

July 1, 1982	Motion of the parties to dispense with printing the joint appendix filed.
July 7, 1982	DISTRIBUTED. SL7P5. (Above motion).
July 12, 1982	Order extending time to file the petitioner's brief on the merits until Aug. 21, 1982.
Aug. 20, 1982	Order further extending time to file the petitioner's brief on the merits until September 4, 1982.
Sept. 3, 1982	Brief for the petitioner filed.
Sept. 28, 1982	Order extending time to file the respondents' brief on the merits until Nov. 8, 1982.
Oct. 4, 1982	The motions of the parties to dispense with printing the joint appendix is GRANTED.
Nov. 8, 1982	Brief, amici curiae, of Shoshone Tribe of the Wind River Indian Reservation, et al. in support of respondents filed.
Nov. 8, 1982	Brief for the respondents filed.
Dec. 14, 1982	CIRCULATED.
Feb. 22, 1983	Reply brief for the United States. (D).
March 1, 1983	ARGUED.